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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 914

UNITED STATES OF AMERICA, APPELLANT

v.

FIRST CITY NATIONAL BANK OF HOUSTON, SOUTHERN NATIONAL BANK OF HOUSTON, AND WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

No. 972

UNITED STATES OF AMERICA, APPELLANT

v.

PROVIDENT NATIONAL BANK, CENTRAL PENN NATIONAL BANK OF PHILADELPHIA, AND WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the district courts (J.S. 914, App. A; J.S. 972, App. A) are not reported.

JURISDICTION

In No. 914, the judgment of the district court (J.S. 914, App. B) dismissing the government's complaint was entered on December 7, 1966. The United States filed a notice of appeal to this court on December 19, 1966. Probable jurisdiction of the appeal was noted on January 16, 1967. In No. 972, the judgment of the district court (J.S. 972, App. A, p. 14) dismissing the government's complaint was entered on December 29, 1966. The United States filed a notice of appeal to this Court on January 10, 1967. Probable jurisdiction of the appeal was noted on January 23, 1967. In both cases the jurisdiction of this Court to review the judgments below on direct appeal rests on Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. 29. *United States* v. *Continental Can Co.,* 378 U.S. 441; *United States* v. *du-Pont & Co.,* 353 U.S. 586.

QUESTIONS PRESENTED

1. Whether, under the Bank Merger Act of 1966, once the government in an antitrust suit challenging a bank merger establishes that the merger may substantially lessen competition, defendants have the burden of proving that the merger's anticompetitive effects are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

2. Whether, if the judgments below are reversed, the statutory stay of consummation of the mergers revives automatically, without further order by the district courts.

STATUTES INVOLVED

The pertinent portions of the Clayton Act, and the Bank Merger Act of 1966, are printed in App. A, *infra*, pp. 67–74.

STATEMENT

NO. 914

On May 12, 1966, First City National Bank of Houston and Southern National Bank of Houston entered into an agreement to merge. After the agreement was approved by the stockholders of each bank on or about June 16, 1966, an application for approval of the proposed transaction was made to the Comptroller of the Currency as required by 12 U.S.C. 1828(c). Under the Bank Merger Act of 1966 (App. A, *infra*, pp. 67–74), effective on February 21, 1966, a federal banking agency "shall not approve [a proposed bank merger] whose effect in any section of the country may be substantially to lessen competition, or tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." The Comptroller approved the proposed merger on September 20, 1966, although the Department of Justice and the Board of Governors of the Federal Reserve System had, pursuant to 12 U.S.C. 1828(c)(4), submitted reports to the Comptroller on the competitive factors involved, indicating that the merger would have serious anticompetitive effects.

On October 19, the Department of Justice filed a complaint (App. B, *infra*, pp. 75–82) in a federal district court challenging the proposed merger on the ground that it might substantially lessen competition in violation of Section 7 of the Clayton Act. The complaint was filed within thirty days of the Comptroller's approval, as required by the new Bank Merger Act of 1966. The Act also provides that in any antitrust suit involving a bank merger the court shall apply the same standards as the banking agency and "shall review de novo the issues presented."

The complaint alleged the following facts. First City, the acquiring bank, is the largest commercial bank in Harris County, Texas, and in the Houston metropolitan area.[1] Together with its affiliates, it accounts for about 29.6 percent of all commercial bank deposits in Harris County. Southern National, the acquired bank, is the sixth largest commercial bank in Harris County and in the Houston metropolitan area. With its two affiliates it accounts for approximately 2.8 percent of all bank deposits in the county. Commercial banking in Harris County is heavily concentrated. The five largest commercial banks account for approximately 66.3 percent of all the deposits and 65.2 percent of all the loans of the 85 commercial banks located in the county. This heavy concentration is in large part a direct result of past consolidations among banks in the area.

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[1] The Houston Metropolitan Area consists of Harris, Brazoria, Fort Bend, Liberty, and Montgomery Counties. All figures given are as of December 31, 1965.

The merger of First City and Southern National would produce a bank having (with its affiliates) at least 32.4 percent of all bank deposits in the county. This would increase concentration among the five largest commercial banks in the Houston area to the point where they and their affiliates would account for about 78 percent of total bank deposits.

On October 26, 1966, the Comptroller intervened as a party in the action (as the new Bank Merger Act permits), and on the next day he moved to dismiss the complaint for failure "to state facts sufficient to support a cause of action * * *." On November 1, 1966, the defendant banks filed a motion for dissolution of the statutory stay[3] on the ground that "the plaintiff has made no allegation in its complaint challenging the findings and the determinations of the Comptroller, that any anticompetitive effects resulting from the proposed merger are clearly outweighed in the public interest, as arbitrary, capricious or not supported by substantial evidence. Nor has the plaintiff alleged facts which constitute all the elements of a violation of the Bank Merger Act of 1966, 12 U.S.C. § 1828(c), which is the controlling statute in this case. Because plaintiff refuses to meet its statutory burdens there is no reasonable probability that it will prevail in the trial on the merits."

On November 10, 1966, the Comptroller issued an opinion (App. C, *infra*, pp. 101–116) explaining why he

[3] Under the new Act, commencement of the antitrust suit operates to stay consummation of the merger unless "the court shall otherwise specifically order."

had approved the merger on September 20. He found that the merger would have no adverse effect on competition and that, in any event, "any anti-competitive effects of this transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the Houston area community * * *." On December 1, 1966—the day before the motions to dismiss and to dissolve the statutory stay were to be argued before the district court—the successor Comptroller (who had taken office subsequent to approval of the merger) issued a supplemental opinion (App. C, *infra*, pp. 83-101). In it he concluded that the question of convenience and needs need not be reached because, although competition would be lessened, there were no substantial anticompetitive effects, but that, even assuming that there were such effects, they were outweighed by the "manifold advantages accruing to the Houston area" (*id.* at 97). In particular, he believed that Houston needed bigger banks and that the "well-balanced, capable and progressive staff" (*id.* at 99) of Southern National, the smaller of the two banks, would infuse new life into First City.

After a hearing on December 2, the district court ruled (J.S. 914, App. A) that the Bank Merger Act of 1966 requires the government to plead and prove not only that the merger is anticompetitive but also that the competitive injury is not clearly outweighed by the convenience and needs of the community to be served. Accordingly, the court granted the Comptroller's motion to dismiss for failure to state a cause of action, but stayed dismissal for ten days to give the

government an opportunity to amend its complaint (J.S. 914, App. B).

In the same order the court granted the defendant banks' motion to dissolve the statutory stay, to become effective (if the government did not amend) on the date of dismissal. The government declined to amend, and on December 19, 1966, the court dismissed the complaint and dissolved the statutory stay. The court entered a temporary stay of the merger until December 22, 1966. The government filed an application for a further stay with this Court. After oral argument on the application, Mr. Justice Brennan referred the application to the Court, which granted it on January 16, 1967. In the same order the Court noted probable jurisdiction and granted the joint motion to advance the case on the calendar and to dispense with a printed record.

NO. 972

On or about November 10, 1965, the boards of directors of the Provident National Bank and the Central Penn National Bank of Philadelphia approved an agreement to merge the two banks. On December 6, 1965, the banks applied to the Comptroller of the Currency for approval of the proposed transaction. The Board of Governors of the Federal Reserve System and the Department of Justice, on January 7, 1966, submitted reports to the Comptroller on the competitive factors involved in the proposed merger (see J.S. 972, App. A, p. 18). The Board of Governors concluded that "the overall effect of the proposed merger on competition would be significantly adverse." The Attorney General concluded: "There are

strong reasons * * * for believing that the proposed merger would have an important adverse effect on competition within the Philadelphia banking market * * *. [T]he anticompetitive effects of this merger are important and considerable and there are likely to be no redeeming features." Despite these reports, the Comptroller approved the merger on March 4, 1966 (applying the standards of the recently enacted Bank Merger Act of 1966), and, on March 31, 1966, filed an opinion giving his reasons for approval. The opinion states (J.S. 972, App C, p. 51)

> that this merger, rather than having an overall adverse effect on competition, will have a favorable effect. Further, the increased ability of the resulting bank to serve the convenience and needs of the Philadelphia area by increased efficiency, by a greater lending capacity, through more adequate banking quarters, and by a generally improved quality of banking services makes this merger desirable. * * *

The opinion concludes that the merger "clearly conforms to the statutory criteria and is in the public interest."

On April 1, 1966, the Department of Justice filed a complaint (J.S. 972, App. D) in a federal district court charging that the proposed merger might substantially lessen competition, in violation of Section 7 of the Clayton Act. The complaint alleged the following facts: Provident, the acquiring bank, is the fifth largest commercial bank in the four-county Philadelphia area,[3] accounting for 9 percent of the

[3] This four-county area consists of Philadelphia, Bucks, Delaware and Montgomery Counties, Pennsylvania.

area's bank deposits of individuals, partnerships and corporations (IPC deposits). Central Penn, the acquired bank, is the sixth largest. It accounts for approximately 5 percent. Commercial banking in this area is already heavily concentrated. The five largest banks account for some 71 percent of all IPC deposits and 74 percent of all loans of the 37 banks located in the area. This heavy concentration is in large part a direct result of past consolidations. The merger of Provident and Central Penn would increase concentration among the five largest commercial banks in the four counties to the point where they would account for about 76 percent of total IPC deposits.

On August 11, 1966, the Comptroller (who had intervened as a party in the antitrust action) moved to dismiss the complaint, and on August 22 the defendant banks followed suit. They argued in effect that the government was unwilling to shoulder the burden of proving that the merger was not justified by its probable effect in meeting the convenience and needs of the community. The district court initially denied the motions to dismiss (J.S. 972, App. A, pp. 17–25), on the ground that the action was "now only at the notice pleading stage" and that the complaint was adequate to place the parties on notice that the government believed that the merger was illegal under the Clayton Act as modified by the Bank Merger Act of 1966. However, on November 4, the district court ruled that in order to prove that the merger was illegal the government would be required to show both that the merger would have substantial anticompetitive effects and "that these anticompetitive effects are

not clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." (J.S. 972, App. A, pp. 14–17.) The court indicated that great weight would be accorded the findings of the Comptroller: if it "appears that the decision of the Comptroller [approving the merger] is dependent on an exercise of discretion, the Court will bow to that discretion. However, if from the fact findings it appears that the Comptroller abused, exceeded or arbitrarily applied his discretion, the Court will set it aside." (J.S. 972, App. A, p. 16.)

On December 2, 1966, the defendant banks moved for entry of a final judgment dismissing the complaint on the ground that the government had indicated in various filings that it was unwilling to assume the burden of proof on the "convenience and needs" issue. The Comptroller made a similar motion on December 6. On December 29, the district court granted the motions, holding that the government must bear the burden of proof on the "convenience and needs" issue. The court indicated that one reason for its holding was its view that the government was in error in believing that the court "must make an independent decision as to whether the public interest in the merger outweighs any anticompetitive effects." (J.S. 972, App. A, p. 12.)

At the same time that the court dismissed the complaint, it lifted the statutory stay of the merger, but provided that the merger could not be consummated before January 18, 1967. The government filed an application with this Court for a stay. Mr. Justice

Brennan granted the application. On January 23, 1966, this Court noted probable jurisdiction. In its order it granted the motion to advance and to dispense with a printed record, and set the case for oral argument immediately following No. 914.

SUMMARY OF ARGUMENT

The Bank Merger Act of 1966 amends the Bank Merger Act of 1960 by forbidding the federal banking agencies to approve any bank merger whose effect may be substantially to lessen competition, unless its anticompetitive effects are "clearly outweighed in the public interest" by the merger's "probable effect * * * in meeting the convenience and needs of the community to be served." The new Act also provides that, in any antitrust action challenging a bank merger, the court shall apply the same standard as the agency, and shall "review de novo the issues presented." These appeals, arising from the dismissal of two separate antitrust actions challenging bank mergers under the new standard, present as the main question whether the 1966 Bank Merger Act requires the government to assume the burden of proving that the merger's adverse effects are not clearly outweighed by considerations of community convenience and need. An additional question is whether consummation of the merger will remain automatically stayed if this Court reverses the district court judgments.

I

If settled principles of evidence be applied to the interpretation of the Act, there is little doubt that

the defendant banks and not the government should be required to shoulder the burden of proof on the convenience and needs issue. The burden of proving justification or exemption under a special exception to the prohibitions of a statute normally rests on one claiming the benefits of the exception. It is plain that the convenience and needs defense constitutes such a special exception, and a review of legislative history shows that Congress specifically understood that the banks would bear the burden of establishing the defense. Moreover, this is a practical result, since it requires the party with greater access to the relevant information to produce it and avoids forcing the other party to prove the negative of a proposition.

II

We next consider the contention that Congress intended by the 1966 Bank Merger Act to create a scheme for administrative, not judicial, adjudication of legality—a scheme whereby the court in the antitrust action is limited to deciding whether an agency decision approving the challenged merger is supported by substantial evidence and not vitiated by legal error. The contention is relevant to the question presented here because were the scheme of the statute as described, it could be argued plausibly that the burden is indeed on the government to negate the agency's finding that the anticompetitive effects of the challenged merger are clearly outweighed by countervailing considerations of community convenience and needs.

A.

But that is not the scheme of the Act. Proposals that would have created just such a relationship between agency and courts were repeatedly rejected. The compromise bill that emerged and was enacted as the Bank Merger Act of 1966 was designed 1) to tighten the standard used by the banking agencies in passing upon merger applications—the agencies having proved lax in preventing anticompetitive bank mergers—and, 2) in the interest of uniformity of administration and to mitigate the severity of applying strict antitrust standards to the banking industry, to require the courts in antitrust suits involving bank mergers to apply the same new standard as the agencies. But no intent to give primacy to the agency's determination or to relegate the antitrust court to a subordinate reviewing role is inferrable from the history and debates of the 1966 Act.

On the contrary, the provisions of the Act themselves make quite clear that the antitrust court was to make an independent determination. The judicial proceedings are referred to as antitrust—not review—proceedings, a misnomer if the court was intended only to satisfy itself that the agency decision was adequately supported. The Act also directs the antitrust court to apply the same standard as the agency; a review standard would, of course, be a different standard. The Act contains no provisions for the agency to conduct a hearing on a merger application, and in fact the banking agencies typically do not. It would be anomalous to accord great weight to so informal a

determination. Finally, at the suggestion of the Attorney General Congress included a provision that "the court shall review de novo the issues presented." This provision was meant to assure that the court would make an independent determination of liability—would review the issues themselves and not merely the agency's decision—and so the members of Congress understood it.

B.

The standard of the new Act is one the courts can independently apply without risking intrusion upon functions constitutionally reserved to administrative agencies.

1. Federal judges are frequently called upon to balance competing considerations under generally worded statutes—notably in the antitrust area itself. It is not seriously suggested that such adjudications raise constitutional questions. Moreover, the standard of the Bank Merger Act of 1966 is far from being a broad "public interest" standard. The text and history of the Act show that the "convenience and needs" defense—the only possible source of vagueness—was intended to have a precise and limited content. The only factors that may be relevant to establish the defense—whether one of the defendant banks is floundering or stagnating or in peril of failure, whether the merger may have beneficial competitive effects outside the particular markets that the merging banks currently serve, and whether the merger is necessary to bring an important new banking service to the community—are all ones that courts are fully

capable of determining and evaluating. Moreover, the task of weighing them against the anticompetitive effects of the merger has been simplified by Congress' provision that the merger is not to be excused unless the competitive effects are "clearly" outweighed by the countervailing benefits.

2. Nor is the agency conspicuously better equipped than the court, in these cases, to make the ultimate judgment that the Act requires. The predominant element of the legal test under the Act is competitive effect—a subject on which the courts are plainly more experienced than the banking agencies. There is thus no sound reason why the agency's judgment should be accorded great weight.

III

The Bank Merger Act of 1966 provides that the commencement of an antitrust suit challenging an approved merger within the time permitted by the Act shall stay the agency's approval, unless the court otherwise specifically orders. In the present cases the courts below dissolved the stautory stay as an incident to dismissing the government's complaints. The question arises whether the stay automatically revives if this Court reverses the judgments of dismissal or whether a further order of the district court is required. We think the former. To avert the extreme practical difficulties that attempts to divest bank mergers pose, Congress intended the legality of bank mergers normally to be determined in advance of their consummation. Consistently with this principle, we think that when dissolution of the statutory stay is

premised on an erroneous judgment of dismissal, the dissolution falls with the judgment and the stay revives automatically. We also suggest the standards that, in our view, should govern the district court's consideration of any motion by the defendant banks to dissolve the statutory stay while the litigation is in progress.

ARGUMENT

INTRODUCTION

These consolidated cases are the first to bring before this Court the Bank Merger Act of 1966 (P.L. 89-356), which became effective on February 21, 1966. While the principal question presented is seemingly a narrow one of determining where the burden of proving certain issues in antitrust proceedings affected by the new Act lies, it cannot properly be considered *in vacuo*. Accordingly, we open our discussion with a brief description of the structure and principal provisions of the Act.[4]

The Act had three principal purposes: to settle the antitrust status of certain bank mergers consummated prior to its enactment; to create a new standard to guide the federal banking agencies in passing upon merger applications; and to create new rules for antitrust proceedings involving mergers approved by the agencies. All of these purposes have at least some bearing upon the issues before the Court.

1. Section 2 of the Act pertains to mergers consummated before its enactment. Section 2(a) establishes a conclusive presumption that any merger in

[4] The Act is reprinted in its entirety in App. A, *infra*, pp. 67-74.

which consummation occurred prior to June 17, 1963 (the date of this Court's decision in *United States v. Philadelphia National Bank*, 374 U.S. 321, which first held that Section 7 of the Clayton Act applies to bank mergers), and in which divestiture of the acquired bank had not yet been effected at the time the new Act was passed, did not violate the antitrust laws (other than Section 2 of the Sherman Act, 15 U.S.C. 2).[5]

2. Section 18(c) of the Federal Deposit Insurance Act, 12 U.S.C. 1828(c), requires banks subject to federal supervision (national banks, State banks that belong to the Federal Reserve System, and non-member State banks that carry federal deposit insurance) to obtain the permission of the appropriate federal banking agency[6] to merge or consolidate with another bank. Before acting on the application, the responsible agency "shall request reports on the competitive factors involved from the Attorney General and the other two banking agencies" (see note 6, *supra*), 12 U.S.C. 1828(c)(4). The Bank Merger Act of 1966 lays down a new standard which the agency must apply in passing on the application. It provides (12 U.S.C. 1828(c)(5)):

[5] Section 2 of the Sherman Act proscribes monopolization and attempts and conspiracies to monopolize.

[6] The Comptroller of the Currency, if the acquiring bank is a national bank; the Board of Governors of the Federal Reserve System, if the acquiring bank is a State member bank; the Federal Deposit Insurance Corporation, if the acquiring bank is a nonmember insured bank. 12 U.S.C. 1828(c) (1), (2).

The responsible agency shall not approve—

(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

3. Under the new Act, if the banking agency approves a merger, it must notify the Attorney General, and the merger may not be consummated until 30 days have elapsed from the date of the agency's approval. 12 U.S.C. 1828(c)(6). "Any action brought under the antitrust laws arising out" of the merger "shall be commenced" within the 30-day period. 12 U.S.C. 1828(c)(7)(A). After that period, the merger may not be attacked in an antitrust suit

except in one based on Section 2 of the Sherman Act. 12 U.S.C. 1828(c)(7)(C).

The Act further provides that "[t]he commencement of * * * [the antitrust] action shall stay the effectiveness of the agency's approval unless the Court shall otherwise specifically order", and that in the antitrust action "the court shall review de novo the issues presented." 12 U.S.C. 1828(c)(7)(A). The banking agency that approved the merger "may appear as a party of its own motion and as of right, and be represented by its counsel." 12 U.S.C. 1828(c)(7)(D). Finally, unless the antitrust suit is based on Section 2 of the Sherman Act, "the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5)" (12 U.S.C. 1828(c)(7)(B)), which is quoted *supra*, p. 18.

Such in brief is the structure of the Act that this Court must here construe. With this as background we turn to the issues presented by these appeals.

I

IT IS A SETTLED PRINCIPLE THAT ONE WHO SEEKS THE BENEFIT OF A STATUTORY EXEMPTION MUST ESTABLISH HIS ENTITLEMENT TO IT. CONGRESS CLEARLY INDICATED THAT THIS RULE WAS TO BE APPLIED TO CLAIMS UNDER THE BANK MERGER ACT OF 1966 THAT A MERGER'S ADVERSE COMPETITIVE IMPACT IS CLEARLY OUTWEIGHED BY ITS PROBABLE EFFECT IN MEETING THE CONVENIENCE AND NEEDS OF THE COMMUNITY TO BE SERVED

Under the Bank Merger Act of 1966, a bank merger shown in an antitrust suit to have substantial anti-

competitive effects is unlawful "unless [those effects] are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served." The principal[7] question for decision here is whether the burden of proof is on the defendant banks to establish that an anticompetitive merger is within this exception.

Prima facie, an affirmative answer seems inescapable. It is hornbook law "that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits." *Federal Trade Commission v. Morton Salt Co.,* 334 U.S. 37, 44–45; *Javierre v. Central Altagracia,* 217 U.S. 502, 508; *United States v. Fleischman,* 339 U.S. 349; *McKelvey v. United States,* 260 U.S. 353; *Williams v. United States,* 138 F. 2d 81 (C.A. D.C.); *Nicoli v. Briggs,* 83 F. 2d 375 (C.A. 10); *United States v. King & Howe,* 78 F. 2d 693 (C.A. 2).[8] The rule fits squarely the pertinent

[7] The other question in the case relates to the Act's provision for stays of bank mergers pending antitrust suits attacking them.

[8] *United States v. Cook,* 17 Wall. 168, and *United States v. Behrman,* 258 U.S. 280, relied on by appellees, are not to the contrary. Those cases (both of which sustained the indictments involved) stand for the unexceptionable proposition that a criminal indictment must adequately inform a defendant of the elements of the crime with which he is charged. The complaints in these civil cases are detailed and obviously adequate to inform the opposing parties of what they must meet and defend. See J.S. 972, App. A, pp. 17–25. Nor does *Seese v. Bethlehem Steel Co.,* 74 F. Supp. 412 (D. Md.), help appellees. The court held there that the plaintiff was required

language of the Bank Merger Act. Anticompetitive bank mergers are broadly proscribed, subject only to an exception for those mergers whose adverse competitive effects are "clearly outweighed" by certain other factors. The syntax—a dependent clause introduced by "unless"—makes manifest the exceptional nature of the justification. This is further reinforced by the provision that, to save an anticompetitive merger from condemnation, the merger's adverse effects must be not only "outweighed," but "clearly" so, by extenuating factors; Congress could hardly have been more emphatic in indicating that justifiably anticompetitive bank mergers would indeed be exceptional.[9]

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in his complaint to negative a provision of the Portal-to-Portal Act beginning with the word "except" because the "Act in this respect *does not constitute technically an exception* to the general liability under the Fair Labor Standards Act but is an enactment by Congress which specifically defines what constitutes compensable time under the Fair Labor Standards Act," 74 F. Supp. at 415-416 (emphasis added). Nor does it make any difference that the exception in the present statute occurs in the same clause as the basic prohibition, rather than before or after it. See, *e.g.*, *Freight Consolidators Cooperative, Inc.* v. *United States*, 230 F. Supp. 692 (S.D.N.Y.); *Williams* v. *United States*, 138 F. 2d 81 (C.A. D.C.); *United States* v. *King & Howe*, 78 F. 2d 693 (C.A. 2). So, also, it is a matter of indifference whether the exception is set off by parentheses or commas. *Nicoli* v. *Briggs*, 83 F. 2d 375 (C.A. 10).

[9] The House Report (H. Rep. No. 1221, 89th Cong., 2d Sess., pp. 3-4) explicitly states:

> * * * the bill acknowledges that the general principle of the antitrust laws—that substantially anticompetitive mergers are prohibited—applies to banks, but permits an *exception* in cases where it is clearly shown that a given merger is so beneficial to the convenience and needs of the community to be served * * * that it would be in the public interest to permit. [Emphasis added.]

To require the government to bear the burden of proving that a merger's anticompetitive effects were not clearly outweighed by justifying factors would also offend the principle that normally the burden of proof rests on the party having the affirmative—not the negative—of the issue. *United States* v. *Fleischman,* 339 U.S. 349; *United States* v. *Denver & R. G. R.R.*, 191 U.S. 84; 1 Jones, *Evidence* (5th ed., 1958), § 209. Here, moreover, as in *United States* v. *Denver & R. G. R.R., supra,* 191 U.S. at 91, a different rule "would require the plaintiff not only to establish a negative, * * * but to establish it by testimony peculiarly within the knowledge of the defendant." See, also, *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U.S. 61; *Morrison* v. *California,* 291 U.S. 82; 9 Wigmore, *Evidence* (3d ed., 1940), § 2486; McCormick, *Evidence* (1954), p. 318. More often than not, evidence showing that a bank merger may be within the exception provided in the Act is likely to be in the possession of the defendants. Certainly the banks are more intimately familiar than the government with their own "financial and managerial resources and future prospects"—the factors the Act specifically states should be considered in determining effect upon community convenience and needs.

That the construction indicated by these principles was intended by Congress is borne out by the fact that every Congressman who spoke to the question was explicit that the burden of proving the convenience and needs defense would be on the banks. The sponsor of the bill that was finally enacted (Congressman Patman) stated: "It should be clearly noted

that the burden of establishing such 'convenience and needs' is on the banks seeking to merge; and when we say clearly outweighed we mean outweighed by the preponderance of the evidence.'" 112 Cong. Rec. (daily ed.) 2333–2334. Congressman Reuss, one of the bill's principal draftsmen, said that the bill "means that an anticompetitive merger should be approved only in a case where the proponents of a bank merger can establish that the advantage of the merger in terms of the convenience and needs of the community clearly outweighs the anticompetitive effects of the merger. This intentionally creates a heavy burden for the proponents of a merger and I anticipate very few cases in which this burden could be sustained." 112 Cong. Rec. (daily ed.) 2337. And in dissenting from the House Report, Congressman Todd indicated his agreement that "the burden of proof shall be upon the merging institutions to show that any substantial lessening of competition caused by the merger is clearly outweighed in the public interest." H. Rep. No. 1221, 89th Cong., 2d Sess., pp. 37–38.

We would rest our case here, but for the contention that Congress intended by the Bank Merger Act of 1966 to create a scheme of administrative adjudication of bank merger cases with the courts limited to a strictly reviewing role—determining whether the banking agency's findings, approving the merger, are supported by substantial evidence. Were that the scheme of the statute, much could be said for the proposition that the antitrust plaintiff must show affirmatively that the agency erred in deeming the merger's anticompetitive effects "clearly outweighed" by con-

siderations of community convenience and need—must show, in other words, that the competitive effects are *not* clearly outweighed. But that is not the scheme of the new Act. Congress, to be sure, has required that all proposed mergers involving banks subject to federal supervision obtain the approval of the responsible federal banking agency. But it has also very clearly provided that if such an approved merger is challenged in an antitrust suit, the court shall make an independent determination of legality—not merely review the agency's decision to the limited extent that orders of administrative agencies like the Interstate Commerce Commission are reviewed.

We devote Part II of our argument to an exploration of this—the underlying—issue in the case: What is the nature of the regulatory scheme that the new Bank Merger Act creates?

II

THE BANK MERGER ACT OF 1966 CONTEMPLATES THAT THE COURT IN AN ANTITRUST ACTION INVOLVING A BANK MERGER SHALL MAKE AN INDEPENDENT DETERMINATION OF THE LEGALITY OF THE MERGER UNDER THE STANDARDS OF THE ACT—NOT MERELY REVIEW THE BANKING AGENCY'S DETERMINATION TO ASCERTAIN WHETHER IT IS SUPPORTED BY SUBSTANTIAL EVIDENCE

Appellees argue that, in passing the Bank Merger Act of 1966, Congress intended that the district court in an antitrust suit involving a bank merger would henceforth accord the banking agency's approval of the merger presumptive validity, and hold the merger illegal only if it was persuaded that the agency's ac-

tion had been clearly unsupported. From this they reason that the plaintiff must establish not only that the merger has substantial anticompetitive effects but also that the agency erred in finding those effects clearly outweighed by considerations of community convenience and need. We challenge the premise. No provision of the Act purports to give primacy to the agency's determination. All indicates are that Congress intended the court to exercise an independent judgment in applying the new legal standard created by the Act. That standard, moreover, is readily susceptible of effective judicial application.

A. THE BACKGROUND, THE PURPOSES, AND THE PROVISIONS OF THE ACT ALL DEMONSTRATE THAT THE COURT IS TO EXERCISE AN INDEPENDENT ROLE IN APPLYING THE STATUTORY STANDARD

1. Behind recent bank merger legislation lies, ultimately, Congressional concern with the apparent unwillingness or inability of the Federal banking agencies—to which virtually all proposed bank mergers must be submitted for approval (see p. 17, *supra*)—to stem the tide of mergers that unduly lessen competition in this most vital industry. Such concern first became acute in 1960. During the decade that ended that year, 1503 independent banks—with total resources of more than $25 billion—had disappeared through merger. *United States v. Philadelphia National Bank*, 374 U.S. 321, 326. The Bank Merger Act of 1960 for the first time expressly directed the agencies to "take into consideration the effect of the transaction on competition," but the Act failed to indicate the weight to be assigned this

factor.[10] The legislative history of the 1960 Act makes plain that Congress believed current regulation was inadequate to cope with anticompetitive bank mergers[11] and intended that the new standard would "make mergers of banks more difficult." 105 Cong. Rec. 8131 (remarks of Senator Robertson). Its purpose was "to promote a sound banking system in the interest of the government, borrowers, depositors and the public; and to promote competition as an indispensable element in a sound banking system." S. Rep. No. 196, 86th Cong., 1st Sess., p. 23. See, also, *id.* at 8; H. Rep. No. 1416, 86th Con., 2d Sess., pp. 3, 5.[12] Congress be-

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[10] The Act, 74 Stat. 129, 12 U.S.C. 1828(c), provided in pertinent part:

> In granting or withholding consent under this subsection, the Comptroller, the Board, or the Corporation, as the case may be, shall consider the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of this chapter. In the case of a merger, consolidation, acquisition of assets, or assumption of liabilities, the appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest.

[11] See, *e.g.*, 105 Cong. Rec. 8131 (remarks of Sen. Robertson); Interim Report of the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 1st Sess., p. 40; S. Rep. No. 196, 86th Cong., 1st Sess., p. 1.

[12] During the debates on the 1966 Act, remarks made by several Congressmen reflect the understanding that the object of the 1960 Bank Merger Act had been to make it more difficult

lieved that the new law would stop most anticompetitive mergers, albeit recognizing that some would be justified by "banking" considerations.[13]

These expectations were not fulfilled. The banking agencies rarely turned down a merger application under the new Act,[14] although many proposed bank mergers appeared to have gravely anticompetitive effects. As many as 30 percent of those approved may have produced concentration as serious as that involved in *United States* v. *Philadelphia Na-*

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for banks to merge. See remarks of Representative Patman, 112 Con. Rec. (daily ed.) 2335; remarks of Representative Minish, 112 Cong. Rec. (daily ed.) 2344.

[13] The Senate Report, p. 23, states:

> The decision in most cases can be expected to be clear. In many cases the proposed merger will not reduce competition at all and there will be sound and convincing banking reasons for authorizing the merger. In other cases the proposed merger will clearly increase and strengthen competition, and there will be no banking factors which might lead to rejection of the merger. In still other cases there will be serious danger of very considerable reduction in competition, and few or no sound banking reasons to approve the merger. In any of these cases, there need be little hesitation in approving or denying the application.

[14] In a careful study done for the Federal Reserve Board by Professors Hall and Phillips, *Bank Mergers and the Regulatory Agencies*, (Federal Reserve Board 1964), the authors show that between May 1960, when the Bank Merger Act was passed, and the end of 1962 the bank agencies considered 434 applications to merge. The Attorney General reported adverse competitive consequences in 200 of these cases. Nonetheless, the agencies approved mergers in 414 cases. In other words, although the Department of Justice reported adverse competitive consequences in 46 percent of the cases, only 4.6 percent were disapproved (*id.* at 23, 27, 43, 46, 57, 60).

tional Bank, 374 U.S. 321.[18] Failing to persuade the agencies to take a stricter line, the Department of Justice instituted antitrust actions against some of the banks whose mergers had been approved. This program of enforcement culminated in the *Philadelphia Bank* decision, *supra,* in which this Court (on June 17, 1963) held that bank mergers were fully subject to Section 7 of the Clayton Act, 15 U.S.C. 18—the Celler-Kefauver Anti-Merger Act. In so holding, the Court expressly rejected the contention that the Bank Merger Act of 1960 "immunize[d] approved mergers from challenge under the federal antitrust laws." 374 U.S. at 350. The Court stressed that the Act contained no immunity provision and did not even provide for a hearing before the banking agency on a merger application. *Id.* at 351. The Court did not consider what, if any, weight the agency's determination should be accorded in the antitrust case. However, there is no suggestion in the Court's opinion that such determination was to enjoy any presumption of correctness or that the task of the Section 7 court was merely to review the agency's findings, and it is significant that the Court's analysis of the legality of the challenged merger contains only a single reference to the agency's findings. *Id.* at 361-362.

Some believed that the standard of Section 7—which, as explained by the Court, seemed to make

[18] Hall and Phillips, *supra,* at 124. In the *Philadelphia Bank* case the merger combined the second and third largest banks in the Philadelphia area into a single bank accounting for more than 30 percent of the market. *United States* v. *Philadelphia National Bank, supra,* at 364.

competitive effect virtually the sole test of legality[16]—was too stringent to be entirely suitable for the banking industry, in view of the unique public interest in sound and viable banks.[17] This impression was reinforced when the Court applied a similarly strict competitive standard under Section 1 of the Sherman Act in *United States v. First Nat. Bank & Trust Co. of Lexington*, 376 U.S. 665. In addition, bank mergers challenged under Section 7 that had been consummated before the *Philadelphia Bank* decision were said to pose insoluble problems of divestiture (see pp. 56–59, *infra*).[18] Accordingly, on April 5, 1965, Senator Robertson introduced a bill in the Senate (S. 1698, 89th Cong., 1st Sess.) that would have (1) excused from antitrust prosecution those bank mergers currently under court challenge, and (2) granted the banking agencies exclusive jurisdiction to determine the legality of proposed bank mergers, immunizing all mergers approved by the agencies from the direct operation of the antitrust laws. Senator Proxmire proposed an amendment eliminating the immunity provision while

[16] The Court stated that Congress in Section 7 had "proscribed anticompetitive mergers, the benign and malignant alike", and that "a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial." 374 U.S. at 371.

[17] The Court had, however, in its opinion expressly left open the possibility that in a Section 7 case involving bank mergers special defenses "in order to avert unsound banking conditions" might be recognized. 374 U.S. at 372, n. 46.

[18] Some felt, too, that it would be unfair to subject these mergers to divestiture for, it was argued, this Court's decision in *Philadelphia Bank* holding Section 7 of the Clayton Act applicable to bank mergers had been unforeseen.

excusing particular defendants from antitrust prosecutions (see S. Rep. No. 299, 89th Cong., 1st Sess.). The amendment was accepted and the Robertson-Proxmire bill passed the Senate. However, it was not accepted by the House Banking Committee.

Numerous substitute bills were considered by that committee. Some provided (like Senator Robertson's original bill) for a broad antitrust immunity (*e.g.*, H.R. 7563, 89th Cong., 1st Sess.); another that the antitrust court should review the banking agency's decision in the same manner that the decisions of administrative agencies generally are reviewed (H.R. 11011, 89th Cong., 1st Sess.); and another that the court should review all issues "de novo" (H.R. 12173, 89th Cong., 2d Sess.). The Attorney General made clear his view that all issues considered by the banking agency should be tried in court:

> I am opposed to particular procedures set forth in HR. 11011. The bill provides for review in a court of appeals on the basis of a "record" upon which the order complained of was entered, and further provides that on review the findings of the agency as to the facts, if supported by substantial evidence, shall be conclusive. This type of review is normally used for determinations by such agencies as the Federal Power Commission and the Federal Trade Commission who, pursuant to the Administrative Procedure Act, have held full public adversary hearings on a public record, with full opportunities to all parties to develop evidence as to rebut evidence produced by the others. No such procedures for the full development of a record are provided for by the Bank Merger

Act or by any current proposal, and indeed there are important considerations that make the more summary handling of merger applications particularly appropriate. Since the vast majority of applications raise no serious problems of an antitrust nature, there would seem to be little point in subjecting all merger applications before the regulatory authorities to all of the requirements of the Administrative Procedure Act in order to lay the groundwork for court review in those few instances where serious questions of competition are presented.[19]

The Attorney General also sent the Committee a draft of a bill, designed to carry out his recommendations, which provided that in an antitrust action "the court shall review de novo the issues presented." See H. Rep. No. 1221, 89th Cong., 2d Sess., p. 18.

The House Committee eventually agreed upon a compromise, which Congress approved as the Bank Merger Act of 1966. The disputed points were resolved as follows:

(1) Three of the six bank mergers mentioned in the Senate bill were forgiven.

(2) A competitive standard much stronger than that of the 1960 Bank Merger Act was imposed on the banking agencies. In effect, they were forbidden to approve any merger having the adverse competitive effects specified in Section 7 of the Clayton Act unless these effects were clearly outweighed by considerations of community convenience and needs.

[19] Letter to Congressman Wright Patman, Chairman, House Banking and Currency Committee, from Nicholas deB. Katzenbach, Attorney General, dated September 24, 1965, H. Rep. No. 1221, 89th Cong., 2d Sess., p. 9.

This standard "makes the competitive factor preeminent,"[30] thereby curing the major deficiency of the Bank Merger Act of 1960 (see pp. 25–28, *supra*), but at the same time modifies the Clayton Act standard to allow some mergers that might be forbidden by strict application of that statute—this in order to permit the consideration of possible special banking factors (see pp. 43–45, *infra*).

(3) The identical standard was made applicable to antitrust suits challenging approved mergers, so as to adapt Section 7 of the Clayton Act to the special problems of the banking industry. This solution was chosen in place of proposals that would have granted approved mergers antitrust immunity as well as proposals that would have transformed the antitrust proceeding from an independent adjudication of legality to a review of the banking agency's determination. Those proposals were rejected, and the language suggested by the Attorney General to assure independent judicial application of the new legal standard—"the court shall review *de novo the issues presented*" (emphasis added)—adopted *in haec verba*.

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[30] See 112 Cong. Rec. (daily ed.) 2334 (remarks of Rep. Patman). Representative Patman also said (112 Cong. Rec. (daily ed.) 2333):

> This standard gives primary emphasis to the competitive factors in bank merger cases. It allows the competitive factor to be overridden only in those cases where it is established by the proponents of the merger that the convenience and needs of the community to be served by the merger clearly outweighs in the public interest the resulting diminution of competition.

See, also, 112 Cong. Rec. (daily ed.) 2335 (remarks of Rep. Widnall), 2340 (remarks of Rep. Moorhead), 2342 (remarks of Reps. Weltner, Halpern, and Brock), 2344 (remarks of Rep. Minish).

2. The history of the 1966 Act thus affords no basis for an inference that Congress proposed deference to the banking agencies' determinations in antitrust suits involving approved bank mergers. The basic thrust of the Act was to harmonize the roles of the banking agency and the antitrust court, not, however, by limiting the court to a review of the agency's findings, but by formulating a uniform standard—more rigorously competitive than that of the 1960 Bank Merger Act but less rigorous than Section 7 of the Clayton Act—applicable to administrative and judicial proceeding alike.

We stress also the affirmative indications that Congress intended the courts to make an independent determination whether a challenged merger was consistent with the substantive standard of the new Act.

(1) The Act does not purport to create any judicial proceeding for the review of the decision of a federal banking agency to approve a merger. The only judicial proceedings mentioned in the Act are suits brought under the antitrust laws to challenge the legality of approved mergers. The antitrust laws have never been regarded as a vehicle for the review of administrative decisions. Antitrust suits are authorized by Section 4 of the Sherman Act and Section 15 of the Clayton Act "to prevent and restrain violations" of those Acts. They are proceedings to determine the legality of challenged conduct—not the lawfulness of agency orders. Hence, antitrust actions involving regulated industries, courts have consistently determined the legality of mergers without giving any presumptive weight to a prior agency decision. See *United States* v. *Radio*

Corporation of America, 358 U.S. 334; *United States* v. *El Paso Natural Gas Co.,* 376 U.S. 651; *California* v. *Federal Power Commission,* 369 U.S. 482. In *Philadelphia Bank,* as we have seen (see p. 28, *supra*) (and likewise in the *Lexington Bank* case, *supra*), this Court gave no special weight to the banking agencies' views. Nothing in the 1966 Act evinces an intent to change this approach.

(2) The Act provides that in any antitrust action involving an approved bank merger "the standards applied by the court shall be identical with those that the banking agencies are directed to apply." Thus the court, like the agency, must determine whether a challenged merger's adverse competitive effects (if substantial) are clearly outweighed by considerations of community convenience and need—not whether the agency's application of the standard is supported by substantial evidence. The latter, a review standard, would be a different—not an identical—standard. Where the court's function is to review administrative action rather than to make independent determinations of liability, court and agency follow different standards. The agency's is whether in fact the law has been violated; the court's is whether the agency's decision is rational, in accordance with law, and supported by substantial evidence—regardless of whether the court as an original matter would have reached the same result. See *Woodby* v. *Immigration and Naturalization Service,* Nos. 40 and 80, this Term, 87 Sup. Ct. 483, 486; cf. Jaffe, *Administrative Law: Burden of Proof and Scope of Review,* 79 Harv. L. Rev. 914 (1966).

(3) The Act provides that the court in an antitrust action "shall review de novo the issues presented." The use of the words "de novo" strongly indicates that the court should make an independent determination of the issues.[21] We stress that the provision speaks of review not of the agency's *decision* but of the *issues*. The use of the word "review" rather than "trial" has no signficance. The terms "trial de novo" and "review de novo" can be used interchangeably. See *e.g., Floyd* v. *Department of Labor & Industries*, 44 Wash. 560, 567, 269 P. 2d 563, 566 (1954); 4 Davis, *Administrative Law Treatise* (1958), p. 152. "[R]eview de novo of the issues presented" was the very language proposed by the Attorney General, who stressed to Congress his belief that this formulation would require independent judicial determination of the legality of a challenged merger, in sharp contrast to the limited judicial review of, for example, orders of the Interstate Commerce Commission (see pp. 30–31, *supra*). Congress manifestly understood the expression the same way. Representative Reuss, who drafted many of the Act's key provisions, stated (112 Cong. Rec. (daily ed.) 2338):

> I would also like to emphasize that this bill makes the courts the complete and final arbiter of whether a bank merger should be approved under the standard established by this legisla-

[21] See, *e.g., Horton* v. *Liberty Mut. Ins. Co.*, 367 U.S. 348; *Louisville & Jefferson County Planning & Zoning Comm'n* v. *Grady*, 273 S.W. 2d 563 (Ky.); 4 Davis, *Administrative Law Treatise* (1958), p. 152; Jaffe, *Judicial Control of Administrative Action* (1965), pp. 619–620; but see *e.g., DeMond* v. *Liquor Cont. Comm'n*, 129 Conn. 642, 30 A. 2d 547; *Fire Dept.* v. *City of Forth Worth*, 147 Tex. 505, 217 S.W. 2d 664.

> tion. This is accomplished by providing for de novo review in a Federal court of any bank merger approved by a bank supervisory agency and challenged in the courts by the Justice Department. In such a case, the court shall determine independently of the decision of the supervisory agency, on the evidence presented to it, whether the proposed merger violates the standard established in paragraph (5) of this bill.

Representative Patman, the chairman of the House Committee that drafted the Act, stated that the reason for specifically providing that an antitrust court would "review de novo the issues presented" was to make clear that the court would "completely and on its own make a determination as to whether the challenged bank merger should be approved under the standard set forth in paragraph 5(b) of the bill." He added that the "court is not to give any special weight to the determination of the bank supervisory agency on this issue." 112 Cong. Rec. (daily ed.) 2335. Representative Multer also pointed out that "the court is in no way bound by the finding of the nonjudicial supervisory agency." 112 Cong. Rec. (daily ed.) 2353. This was virtually the unanimous view of Congress. See 112 Cong. Rec. (daily ed.) 2339, 2343, 2538.[33]

[33] The only contrary statements that our research discloses consist of a remark by Senator Holland (who had no particular responsibility for the bill) that it "will give greater weight to the finding of the regulating agency without making that final in the event some bad mistake is made" (112 Cong. Rec. (daily ed.) 2550) and a somewhat ambiguous colloquy between Senators Javits and Hart (112 Cong. Rec. (daily ed.) 2548).

(4) To deem the court bound by the agency's decision if it is supported by substantial evidence would be tantamount to saying that Congress repealed the antitrust laws insofar as they apply to bank mergers. For one need not invoke those laws to challenge a banking agency's merger decision merely as arbitrary, capricious, or unsupported by substantial evidence. See 5 U.S.C. 702, 704 and 706; cf. *Citizens National Bank of Maplewood* v. *Saxon,* 249 F. Supp. 557 (E.D. Mo.); *First National Bank of Smithfield* v. *Saxon,* 352 F. 2d 267 (C.A. 4). "Congress, of course, did not repeal the antitrust laws in the Bank Merger Act of 1966. It expressly rejected several bills that would have done so (*e.g.,* S. 1698, 89th Cong., 1st Sess.; H.R. 8096, 89th Cong., 1st Sess.; H.R. 8208, 89th Cong., 1st Sess.). And the Act refers throughout to "antitrust" actions. This Court should not interpret the 1966 Act as if it effected such a repeal for "[i]mmunity from the antitrust laws is not lightly implied." *California* v. *Federal Power Commission,* 369 U.S. 482, 485.

(5) Congress well knew—the point had been made in both the *Philadelphia Bank* opinion and in the Attorney General's second letter to Congress (see pp. 30–31, *supra*)—that the agencies did not conduct hearings on merger applications. The Bank Merger Act of 1960 contained no provision for a hearing and, as the Attorney General explained, there were good reasons for the agencies' informal practice in this regard. Cf. Jaffe, *Judicial Control of Administrative Action* (1965), pp. 103, 621. It would be a curious result to accord presumptive validity to a decision made without a hearing. Had Congress intended such weight to be given in a subsequent antitrust proceeding it

would, therefore, surely have provided for agency hearings in the 1966 Act. It did not.

(6) The same Congress that passed the 1966 Bank Merger Act also passed the 1966 Bank Holding Company Act, which requires district courts in any antitrust suit to "review de novo the issues presented" (12 U.S.C.A. 1849(b)), while at the same time permitting a person aggrieved to appeal the banking agency's determination directly to a court of appeals which is to apply the traditional substantial evidence standard of review of administrative action (12 U.S.C.A. 1848). Thus Congress clearly distinguished between the two types of judicial proceeding in a contemporaneously enacted statute that is *in pari materia* with the Bank Merger Act.

In arguing that Congress intended the courts in antitrust actions involving approved bank mergers to accord no special weight to the agency's action but rather to make their own independent determination of the merger's consistency with the standard prescribed in the Bank Merger Act of 1966, we do not contend that the agency's findings and decision are entitled to no weight at all. If the agency's opinion is cogent and persuasive, doubtless the defendant banks, and the banking agency if it exercises its right to intervene, will place great reliance upon it in arguing that the merger should be allowed, and the court will give careful consideration to the agency's views in arriving at its decision. Our only point is that, under the statute, the responsbility for determining the legality of the merger under the antitrust laws as modified by the new Bank Merger Act remains the

court's. The court may not abdicate that responsibility by limiting its consideration of the issues to ascertaining whether the agency's determination is supported by substantial evidence. The court must determine whether, in its judgment, the merger is in fact legal regardless of the agency's view. That was the practice under the former Bank Merger Act and Congress intended no change.

B. THE LEGAL STANDARD PRESCRIBED BY THE BANK MERGER ACT OF 1966 IS ONE THAT THE COURTS ARE FULLY COMPETENT TO APPLY. THEREFORE, NO CONSTITUTIONAL PROBLEM IS PRESENTED BY THEIR MAKING AN INDEPENDENT JUDGMENT

We have shown that the plain design of the Bank Merger Act is that the district court in an antitrust action involving a bank merger shall make an independent judgment whether the merger's anticompetitive impact (if substantial by customary Section 7 standards) is clearly outweighed by the merger's probable effect in meeting the convenience and needs of the community, according no special weight to (albeit not ignoring) the banking agency's view. It is argued, however, that a balancing judgment of this nature is not one that courts are equipped to make, and indeed that serious constitutional problems can be avoided only by interpreting the statute as entrusting the balancing task exclusively to the banking agencies, with the courts relegated to the limited role they ordinarily occupy in the review of administrative decisions. We disagree. The standard is not too broad or vague for the courts to apply in sound and sensible fashion. Nor is the balancing process required by the standard one that the banking agen-

cies are better equipped to perform that the federal district courts. There is accordingly no basis for torturing the statutory scheme to give primacy to the agency's determination.

1. It is hardly necessary to point out that the federal courts are frequently called upon to apply rather general statutory standards—such as whether a "threatened or actual strike or lockout * * * if permitted to occur or to continue will imperil the national health or safety." 29 U.S.C. 178; see *United Steelworkers* v. *United States,* 361 U.S. 39. Indeed, we need look no further than the antitrust field itself for examples of broad and general standards which allow the court great latitude in interpretation. Chief Justice Hughes' famous description of the Sherman Act as having "a generality and adaptability comparable to that found to be desirable in constitutional provisions" comes immediately to mind. *Appalachian Coals, Inc.* v. *United States,* 288 U.S. 344, 360. His opinion goes on to explain that the Act "does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape. * * * Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness." *Ibid.* This "rule of reason" has not been thought too broad or vague to be judicially applied, though it may frequently involve a weighing of competing considerations—*e.g.,* some restriction on competition against market improvements claimed to be effected by the challenged

practice. See *Chicago Board of Trade* v. *United States*, 246 U.S. 231.

Even in applying the Clayton Act—where Congress seemingly made competitive effect the sole standard of legality—the courts have on occasion balanced competitive restrictions against countervailing economic factors. For example, in *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 334, this Court distinguished requirements contracts from tying arrangements on the basis of the greater economic justification for the former, though competition is foreclosed in either event. In *United States* v. *Philadelphia National Bank*, 374 U.S. 321, the Court made clear that in a bank-merger case Section 7 of the Clayton Act "does not exclude defenses based on dangers to liquidity or solvency, if to avert them a merger is necessary." 374 U.S. at 371–372. It explained that "[t]hus, arguably, the so-called failing-company defense * * * might have somewhat larger contours as applied to bank mergers because of the greater public impact of a bank failure compared with ordinary business failures," and the Court expressly left open the possibility of "defenses * * * [which] must be allowed in order to avert unsound banking conditions" (*id.* at 372, n. 46).

It is true that the Court in *Philadelphia Bank* expressly declined to consider whether, "on some ultimate reckoning of social or economic debits and credits," the merger might be "deemed beneficial," observing that "[a] value choice of such magnitude is beyond the ordinary limits of judicial competence" *ibid.*). It is clear, however, that the Bank Merger

Act of 1966 contemplates no such free-wheeling value judgment. This emerges from a consideration of the steps that must be followed in applying the standard of the Act to a particular case.

(1) The first determination the court must make is whether the challenged merger's "effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade * * *." In essence, of course, this is merely the familiar standard of the Clayton Act—one the courts are practiced in applying. See, further, pp. 49–52, *infra.*

(2) If such an effect is found, the court must next consider "the probable effect of the transaction in meeting the convenience and needs of the community to be served." Superficially, this might appear to invite an unchanneled inquiry into all phases of the merger's possible impact. However, additional language in the statute—which requires the tribunal specifically to "take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions"—and the legislative history indicate that a much more narrow and focused inquiry was intended. It is clear, for example, that Congress' primary concern in establishing a convenience and needs defense was with the problem of the "floundering" bank—a bank not yet insolvent or in imminent danger of failure, but, by reason of poor financial condition, unable to render adequate service to the community. The House Report stressed—almost to the exclusion of any other

factor—the felt inability of traditional antitrust concepts to deal "with the floundering bank problem in medium to smaller sized communities. The problem arises where there is a relatively small number of banks, and one or more of these banks appear to be stagnating," perhaps "because it is below the economic minimum size to attract capable and vigorous management personnel" or "closely held by owners who insist on unrealistically conservative policies * * *" (p. 3). Almost all the comments in the floor debates on the convenience and needs provision likewise emphasized the problem of the floundering or stagnant bank. See 112 Cong. Rec. (daily ed.) 2335 ("declining institution"), 2336 ("casualties" of "free and open competition"), 2338 (bank "in difficulty—say with regard to a problem of management succession"), 2345 ("failing" bank), 2350, 2351 ("what can happen in the community when the bank goes bad"), 2352–2353, 2540, 2545. In view of the experience of the federal courts both in bankruptcy matters and in the application of the failing-company doctrine in antitrust merger cases (see, *e.g., International Shoe Co.* v. *Federal Trade Commission*. 260 U.S. 291; *United States* v. *Diebold, Inc.*, 369 U.S. 654), it cannot tenably be maintained that those courts are incapable of appraising a claim that a bank is floundering or stagnating.

Coping with the floundering-bank problem was unquestionably envisaged as the principal function of the convenience and needs defense. Congress may also have wished to permit the courts, where excep-

tional circumstances so warrant, to consider "conditions in [a] regional or national market * * * insofar as they affect the convenience and needs of the community to be served." 112 Cong. Rec. (daily ed.) 2350; see *id.* at 2338; House Report, p. 3. Some businesses in the community may be large enough to obtain banking services from banks in other communities. A merger might conceivably increase competition for this class of customer—the purchaser in the regional or national market. This is a competitive factor that the courts are fully competent to appraise. See *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 357–362; cf. *United States* v. *Pabst Brewing Co.,* 384 U.S. 546.

Finally, there are some indications that under the new standard it may be appropriate in exceptional cases to consider the effect of a challenged merger in bringing to the community a new and important banking service (see 112 Cong. Rec. (daily ed.) 2541, 2545)—although it is quite clear that Congress did not envisage that ordinary innovations in service (*e.g.,* credit cards or Christmas clubs) would be regarded as a basis for pleading the convenience and needs defense. See 112 Cong. Rec. (daily ed.) 2340, 2350. We see nothing beyond the limits of judicial competence in a determination whether a claimed improvement in banking service is in fact new and important.

(3) Once the court has determined whether the merger will in fact produce any benefits within the scope of the convenience and needs defense, it must next consider whether the challenged merger is neces-

sary to achieve them. If, for example, a management problem that has led to bank stagnation can be resolved by some other, less anticompetitive means, plainly there is no reason to tolerate a merger that is likely to lessen competition substantially. Only those benefits need be weighed which require the challenged merger. Such a determination is required in "failing company" cases. See p. 52, *infra.* It is one that the courts are surely equipped to make.

(4) Only after appraising the claimed benefits of the merger will the court be prepared to perform the ultimate act of judgment required by the Bank Merger Act—that of weighing the competitive harms of the challenged merger against considerations of community convenience and need. In many cases, balancing these factors will be difficult. But Congress has not left the courts to perform the balancing act wholly at large. The Act provides that a merger which violates the competitive standard of the Clayton Act is to be excused only if its competitive effects are *clearly* outweighed by convenience and needs factors. The competitive considerations are thus to be accorded primacy. See p. 32, *supra.* Only an exceptionally strong showing of convenience and needs can tip the balance in favor of permitting the merger. Moreover, as we have seen, the convenience and needs defense was not viewed by Congress as establishing a general public interest standard for testing the legality of bank mergers. Congress had in mind at most a limited number of definite factors that the courts should consider—the problem of the flounder-

ing, stagnant, or failing bank; or, if unusual circumstances obtain, the bearing of competitive effects in other markets besides that most directly affected by the transaction; and the effect of the merger in bringing new and important banking services to the community. A multitude of factors that would be relevant under a general public-interest standard—for example, the impact of the merger upon employment in the community—are clearly, we believe, beyond the intended scope of the defense. Thus, properly construed and applied, the new Bank Merger Act embodies a standard sufficiently narrow and precise as to be susceptible of effective judicial enforcement—a standard that is surely within the constitutional power of the federal courts to apply.

2. What we have said largely disposes of the contention that independent judicial determination whether a challenged merger violates the standard of the Act usurps a function constitutionally reserved to administrative agencies. It is true, of course, that Article III of the Constitution precludes the federal courts from performing legislative-type functions frequently entrusted to administrative agencies. *Keller* v. *Potomac Electric Power Co.*, 261 U.S. 428; *Federal Radio Commission* v. *General Electric Co.*, 281 U.S. 464; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693; *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17. The classic statement of the test for distinguishing judicial from legislative power

is that of Mr. Justice Holmes, speaking for the Court in *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210, 226:

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. * * *

Congress, in passing the 1966 Bank Merger Act, did not give the banking agencies broad latitude to determine what bank mergers should be allowed. The agencies have no discretion to approve a proposed merger contrary to the specific standard laid down in the Act. Cases like *General Electric* and *Idaho Power, supra,* involve a discretion to adopt and to adjust from time to time basic licensing policies, and cases like *Keller, supra,* involve an expert agency's use of discretion to set rate-making policy. The Bank Merger Act of 1966 does not grant any such policy-making discretion to the banking agencies—or to the courts.

In an antitrust suit subject to the Bank Merger Act of 1966 the court is not called upon, in its discretion, to authorize a proposed merger. Its function is to decide whether the merger is legal under the standards prescribed by the Clayton and Bank Merger Acts. The suit is an ordinary judicial proceeding to adjudicate an actual controversy between two parties concerning legal rights. Cf. *Tutun* v. *United*

States, 270 U.S. 568. The Bank Merger Act refers to the proceeding as an "action brought under the antitrust laws," and it allows the banking agency concerned to "appear as a party." 12 U.S.C. 1828(c)(7)(D). The court proceeding is thus not a mere interim stage in an administrative process, as was the case in *Postum Cereal, supra.* And we have seen that the standard defining the legal rights involved is one fully susceptible of being effectively interpreted and applied by a court.

Finally, this is not a case where due "regard for the expertise of special agencies charged with performing the rate-making [or other highly specialized] function [, like licensing] and [with] inherent actual, as well as legal, disability of courts to execute that function" precludes judicial intrusion. *United States* v. *Jones,* 336 U.S. 641, 652. We submit that, in performing the ultimate judgment required by the Bank Merger Act—that of weighing competitive harms against countervailing considerations of community convenience and needs—the banking agencies are no more expert than the courts.

One-half of the equation, competitive effect—the predominant element in the test (see pp. 31–32, *supra*)—involves an area where the superior expertise would seem to reside in the courts. The competitive standard of the Act is drawn verbatim from that of Section 7 of the Clayton Act. "This language was intentionally used so as clearly to indicate * * * that the antitrust standards which have been developed

over the last 75 years on the basis of case law definition of these statutory provisions are intended to be incorporated in the application of the proposed act." 112 Cong. Rec. (daily ed.) 2337 (remarks of Representative Reuss, who drafted this part of the Act); see, also *id.* at 2334 ("the competitive standard to be applied is clearly that of the Sherman and Clayton Act"). The antitrust competitive standard has been evolved by the courts (and the Federal Trade Commission)—not by the federal banking agencies.

As a matter of fact, the standards those agencies have applied in judging the competitive impact of bank mergers have often diverged widely from the judicial standard—indicating that the agencies may not be especially expert in the application of the antitrust concepts that Congress has clearly indicated constitute the predominant component of the new Bank Merger Act's legal test. We have already recounted the unhappy experience with the agencies' handling of competitive considerations in the 1960 Bank Merger Act—an experience that was one of the factors leading to the 1966 amendments. See pp. 27-28, *supra*. Another example of the disparity in the judicial and administrative competitive standards may be found in the fact that the banking agencies, in striking contrast to this Court, do not seem to view increases in concentration as particularly significant from a competitive standpoint. In reporting on the Fidelity-Baltimore National Bank-Maryland Trust Co. merger, the Comptroller of the Currency stated:

By this consolidation there was eliminated 1 of 14 competitors, 1 of 20 competitors with savings banks included, in the Baltimore area; and there resulted an increase in size of 1 competitor from 21 to 29 percent of total resources among commercial banks and from 15 to 20 percent of total resources among commercial and savings banks. * * * Other competitors range from 17 to 11 percent of commercial bank resources and from 13 to 7 percent of commercial and savings bank resources. It appears clear that there would be no tendency toward monopoly. [Annual Report of the Comptroller of the Currency, 1960, p. 54.]

Similarly, the Comptroller's report on the *Philadelphia National Bank* merger had stated:

With respect to local competition there would be eliminated an important competitor, but there would remain in the entire area 46 banks, and in the City of Philadelphia alone 16 commercial and 4 savings banks. Of these 7 commercial banks have assets in excess of $100 million and all of the savings banks are in this category. Thus the consolidation will not deprive the public or the small businesses in Philadelphia of an adequate number of alternative sources of banking service.

Since there will remain an adequate number of alternative sources of banking service in Philadelphia, and in view of the beneficial effects of this consolidation upon international and national competition it was concluded that the over-all effect upon competition would not be unfavorable. [Record, *United States v. Phil-*

adelphia National Bank, 374 U.S. 321, No. 83, O.T. 1962, p. 2861.]

Moreover, the Comptroller has disregarded the admonition of this Court in *Philadelphia Bank* that "the cluster of products * * * and services * * * denoted by the term 'commercial banking' * * * composes a distinct line of commerce." *United States* v. *Philadelphia National Bank, supra,* at 356. In his opinion approving the merger of the two Philadelphia banks involved in No. 972, the Comptroller wrote:

> Henceforth, the competitive impact of a bank merger must be asessed in the light of savings banks, insurance companies, savings and loan associations, credit unions, finance companies, small loan companies, factors, and even department stores and mail order houses, that compete for the credit lines or the savings dollar of the public." [J.S. 972, App. C, p. 32.]

And in his report on the merger involved in No. 914, the Comptroller wrote:

> We view the appropriate product market to include all financial institutions doing business [in the area] * * *. As of December 31, 1963, there were 115 commercial banks * * *. 20 savings and loan institutions * * *, some 240 credit unions * * *, 3 large mortgage placement companies, many small loan and finance companies and a large number of local and national insurance companies, to say nothing of the Federal government's direct lending agencies * * *. [App. C, *infra,* pp. 94-95.]

Consider also the following example. This Court has indicated that, in evaluating the claim that a

merger is permissible under the "failing company" doctrine, the availability of other purchasers whose acquisition of the company would not involve the same anticompetitive consequences is pertinent. See *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655; *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291, 302. See, also, Hearings Pursuant to S. Res. 61 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 84th Cong., 1st Sess., Pt. 1, p. 326; *Report of the Attorney General's National Commi*ttee[redacted] *to Study the Antitrust Laws*, p. 123 (1955). Yet the banking agencies have consistently allowed competing banks to merge on the ground that one is in "failing" or "floundering" condition, without attempting to consider whether alternative purchasers would provide a less anticompetitive alternative to the merger proposed. See Hall and Phillips, *supra*, p. 27, n. 14, at 53, 84.

The banking agencies—which unlike other administrative bodies have no authority to immunize transactions from the antitrust laws, to regulate most of the rates of the corporations subject to their supervision or to fix rates of return [23]—have, indeed, a strictly limited sphere of expertise. They "maintain a close surveillance of the industry with a view toward preventing unsound practices that might impair liquidity or lead to insolvency." *United States* v. *Philadelphia National*

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[23] As this Court pointed out in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 352, "bank regulation is in most respects less complete than public utility regulation."

Bank, 374 U.S. 321, 352. They have no special competence or expertise in the application of antitrust standards to the banking industry—and those standards, as we have seen, are incorporated in the Bank Merger Act of 1966, albeit they do not constitute the whole of the legal test under that Act, in recognition of the high importance of competition in the banking industry.[34] On balance it would seem that the courts can perform the weighing process required by the new Bank Merger Act as knowledgeably and ra-

[34] As the Court observed in *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 369–370, 372:

> There is no reason to think that concentration is less inimical to the free play of competition in banking than in other service industries. On the contrary, it is in all probability more inimical. For example, banks compete to fill the credit needs of businessmen. Small businessmen especially are, as a practical matter, confined to their locality for the satisfaction of their credit needs. * * * If the number of banks in the locality is reduced, the vigor of competition for filling the marginal small business borrower's needs is likely to diminish. At the same time, his concomitantly greater difficulty in obtaining credit is likely to put him at a disadvantage *vis-à-vis* larger business with which he competes. In this fashion, concentration in banking accelerates concentration generally.
>
> * * * * *
>
> At the price of some repetition, we note that if the businessman is denied credit because his banking alternatives have been eliminated by mergers, the whole edifice of an entrepreneurial system is threatened; if the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs, in our credit economy, will be affected; and unless competition is allowed to fulfill its

tionally as the banking agencies. Moreover, it is highly reasonable to require a court to make an independent, neutral adjudication of a dispute that transcends the area of responsibility of a single agency—a dispute that is likely to find the Department of Justice on one side and a banking agency on the other. Cf. 4 Davis, *op. cit. supra*, p. 232. No such neutral adjudication can be made if the court must accord *prima facie* weight to the views of one of the disputing parties. Surely, therefore, neither the Constitution nor sound general principles of administrative law require that the judgment of the agency be accorded presumptive validity and the role of the courts reduced—contrary to the purpose and the text of the Bank Merger Act—to that of affording a limited judicial review of the agency's application of the statutory standard.

III

THE COURTS BELOW DISSOLVED THE AUTOMATIC STATUTORY STAY INCIDENTALLY TO DISMISSING THE GOVERNMENT'S COMPLAINT. IF THIS COURT REVERSES THE JUDGMENTS OF DISMISSAL THE STATUTORY STAY WILL REVIVE BY OPERATION OF LAW [25]

The Bank Merger Act of 1966 provides that the commencement of an antitrust action within the

role as an economic regulator in the banking industry, the result may well be even more governmental regulation.

See, also, Edwards, *The Banking Competition Controversy*, National Banking Review, Sept. 1965, p. 1.

[25] The points argued in this part of our brief are, we believe, comprehended within the reserved question in the jurisdictional statements. J.S. 914, p. 2, n. 1; J.S. 972, p. 2, n. 1. See note 26, *infra*, p. 59.

thirty-day period following the banking agency's approval during which consummation of the transaction is forbidden (12 U.S.C. 1828(c)(6)) "shall stay the effectiveness of the agency's approval [and hence consummation of the merger] unless the court shall otherwise specifically order." 12 U.S.C. 1828(c)(7)(A). Both courts below dissolved the statutory stay upon dismissing the government's complaint. They gave no reason for their action. Doubtless they assumed that by dismissing the complaint they were terminating the litigation and thereby obviating any occasion for a continued stay of the challenged transaction. The question therefore arises whether, assuming this Court reverses the judgments of dismissal, the dissolution of the stay falls with the judgment and the stay revives automatically; or whether a further order by the district court imposing a stay is necessary. We think the former. To avert uncertainty and to provide guidance in the subsequent stages of the litigation, this Court could appropriately, we believe, so indicate in its instructions remanding the cases—and perhaps, in addition, adumbrate in brief the standards that should govern any possible future attempts in the litigation to dissolve the statutory stay.

A.

The stay provided for in the statute arises by operation of law upon the commencement of the antitrust suit. No order of the court is required. Consequently, the burden is not on the government to establish entitlement to a stay, but on the defendant banks to show that the stay should be dissolved. In a case,

like these cases, where the district judge orders the stay dissolved because he is dismissing the complaint, and it later turn out that the dismissal was erroneous, the order should, in our view, be given no further effect in the proceeding. A dissolution order premised on a legal error surely affords no basis for shifting to the government the burden of showing that a stay should be granted. The order falls with the judgment when the judgment is reversed, and the statutory stay is automatically revived, to be dissolved only if the defendant banks can persuade the district court to exercise its discretion to lift the stay.

The principle we urge is necessary to fulfill the clear policy of the Bank Merger Act that—save in extraordinary instances—the legality of a bank merger should be determined before, not after, it is consummated. The Act is captioned an act "[t]o establish a procedure for the review of proposed bank mergers so as to eliminate the necessity for the dissolution of merged banks * * *." Section 2(a) of the Act forgives a number of bank mergers, adjudged unlawful under the antitrust laws, where the merger had been consummated but divestiture had not yet been effected. Under Section 2(b), an antitrust suit may not be brought that challenges any merger consummated before the enactment of the Act. And, as noted, bank mergers may not be consummated until thirty days after approval by the banking agency in order to enable the Attorney General to commence an antitrust suit (which must be brought within the 30-day period) before consummation.

These provisions—and, most pointedly of all, that which provides for an automatic stay of the merger upon commencement of an antitrust suit—reflect a strong congressional belief that it is most often both impractical, and harmful to the public, to attempt to undo a consummated bank merger. The Chairman of the Federal Reserve System testified in the hearings that preceded enactment of the Bank Merger Act of 1966 that "[a] Federal court order cannot recreate the two banks that formerly existed. * * * No matter how one may feel about whether the merger should have taken place in the first instance, there is no turning back. To unscramble the resulting bank clearly poses serious problems not only for the banks but for its customers and for the community." Hearings on S. 1698 and related bills before a Subcommittee of the House Committee on Banking and Currency, 89th Con., 1st Sess., p. 11. The President of the American Bankers Association declared that "'unmerging' a bank after the two banks have operated as a single unit is nightmarish even in the abstract." Hearings on S. 1698 before a Subcommittee of the Senate Committee on Banking and Currency, 89th Cong., 1st Sess., p. 63. Senator Robertson stated, "[y]ou are dealing with a physical impossibility," and "the community gets hurt," when divestiture is attempted in a bank merger case. *Id.*, p. 4. Senator Proxmire spoke of "the agony and the inequity and the financial loss, disruption of the economy in the community of being required * * * to unscramble." *Id.*, p. 202. To like effect, see, *e.g.*, *id.*, pp. 12, 13, 26, 67, 76-77, 83, 92, 202, 206; House Hearings, *supra*, p.

143; H. Rep. No. 1221, 89th Cong., 2d Sess., pp. 31-32 (views of Congressman Todd).

Difficulties in unscrambling consummated mergers are of course not confined to the banking area. See *Federal Trade Commission* v. *Dean Foods Co.*, 384 U.S. 597. But they are especially acute in banking because complex financial relations, not merely physical products, are involved. A few examples will suggest why.

(1) Under the National Bank Act, 12 U.S.C. 215a(e), in a merger all of the trust accounts of the acquired bank vest automatically in the acquiring bank. In the event of divestiture, restoration of the acquired bank as trustee of any such account would require an order from a State court. See 12 U.S.C. 215a(f).

(2) A bank merger results in a higher legal lending limit for single loans for the resulting bank. See 12 U.S.C. 84. If divestiture is decreed the banks might find themselves holding loans in excess of their legal limits, and might be compelled to call them.

(3) All loans and deposits subsequent to the merger would, at divestiture, have to be divided between the merged banks. This would of necessity be a rather arbitrary division. More seriously, it is widely believed in banking circles that, when invited to choose between the merger partners in a divestiture situation, many depositors are likely to take their money elsewhere. See, *e.g.*, Senate Hearings, *supra*, p. 64.

Beyond these practical problems—which could easily be multiplied—there is the general fear that dismembering a bank is likely to undermine public

confidence in the bank, and thereby imperil its solvency and the welfare of the businessmen and individuals who depend on the bank for credit or who have deposited money with it—with resulting harms community-wide in their impact.

We do not suggest that these difficulties are always insoluble. It is enough to note that they pose a formidable obstacle to fashioning an effective remedy in antitrust cases involving bank mergers whose consummation has been allowed, and that Congress included the automatic-stay provision in the 1966 Bank Merger Act precisely in order to forestall the necessity for divestiture. It would seem to follow that only in the rare case should consummation be permitted during the pendency of the antitrust suit.[26] Where the district judge disolves the statutory stay incidentally to granting a motion to dismiss the suit, but the stay is continued in effect by the appellate court, manifestly consummation should not be permitted to follow upon *reversal* of his judgment of dismissal—which robs the dissolution order of its only (albeit, in our view, inadequate (see note 27))

[26] Thus, we believe the district courts below clearly erred in dissolving the statutory stay for the sole reason (so for as appears) that they were ordering dismissal of the government's complaints. Dismissing the complaints did not terminate the litigation. The government had—and exercised—its right of direct appeal to this Court. This Court's action in noting probable jurisdiction in both cases indicates that the government's appeals were not frivolous. In addition, this Court (in No. 914) and a justice of the Court (in No. 972) granted the government's applications for stays pending appeal. These stay proceedings would have been unnecessary had the courts below, consistent with the intent of the automatic-stay provision, continued the statutory stay in effect pending the appeals.

justification. Nor should the government be put to the burden of establishing its entitlement to the stay. That would be contrary to the statutory scheme. The proper rule, we submit, is that the order dissolving the stay falls with the judgment of dismissal on which it depended and the statutory stay revives automatically.

B.

On remand, to be sure, the district court may entertain a motion by the defendant banks to dissolve the statutory stay while the litigation proceeds. As reported out of the Senate committee, the bill proposing the new Bank Merger Act provided for an automatic stay "until after the termination of" the antitrust suit. See S. Rep. No. 299, 89th Cong., 1st Sess., p. 3. The House amended the bill to add the language which appears in the enacted legislation empowering the district court to dissolve the statutory stay. It was feared that the Senate bill "gave the Justice Department an absolute veto over bank mergers," and that to prevent a merger "[a]ll the Department would have to do would be to file a mimeographed complaint" (112 Cong. Rec. (daily ed.) 2539 (remarks of Senator Robertson)). The stay provision was amended to allow consummation when it is clear that plaintiff cannot prevail on the merits because, for example, the merger is necessary to avert an imminent failure. It still "provides for postponement of the merger as the usual rule." *Ibid.* Therefore, we submit, only in such an exceptional case may the

district court properly exercise its discretion to dissolve the statutory stay during the proceeding.

The burden on defendant banks seeking a dissolution is, accordingly, a heavy one. Certainly, nothing that the defendants in the present cases have yet submitted would justify the district courts, on remand, in dissolving the statutory stay. In No. 914 (the *Houston* case), defendant banks have not argued that the government cannot ultimately prevail on the merits of its antitrust case, or that prompt consummation is necessary to avert a failing situation. They say that they have represented in open court that they have contemplated the risk of divestiture and, if they merge, would be prepared to face those risks. But the risks with which Congress was concerned were risks to the public—not to the merger applicants. Moreover, as Congress was well aware (see, *e.g.*, H. Rep. No. 1221, 89th Cong., 2d Sess., pp. 31–32 (views of Congressman Todd)), attorneys for the defendants in the three bank merger cases specifically mentioned by Congress in the Bank Merger Act of 1966 all had made statements in open court similar to, if not stronger than, the statements made by defendants' attorneys in this case concerning their willingness to risk divestiture. Yet Congress believed divestiture would work such hardship to the communities involved that it included as Section 2(a) of the 1966 Act a provision conclusively presuming that those mergers had not violated the antitrust laws (other than Section 2 of the Sherman Act). As the

Chairman of the Federal Reserve System observed in the hearings, "with due respect to the lawyers—I don't know that we should bail out the lawyers on this; but I think that from any point of view the affairs of stockholders and depositors and trust accounts, particularly are very difficult to unscramble after it is already done. I think the lawyers may have made a mistake in having made that statement * * *." House Hearings, p. 143.

In No. 972 (the *Provident* case), the defendant banks make three arguments against any further stay in the consummation of their merger. The first is that delay will be harmful to them. They do not suggest, however, that their fears in this regard are based on any new developments or changed circumstances since they obtained the approval of the Comptroller of the Currency for their merger. And at that time they were advised by the Department of Justice that this antitrust suit—which would automatically stay consummation of the merger—was probable. They knowingly ran the risk of being unable to consummate the merger until its legality was finally decided in the courts; they have no right to complain if—as they must have anticipated—the stay is in fact continued throughout the litigation.

While conceding "the futility of any effort at demerging the Banks two years hence" (memorandum in opposition to the government's stay application in this Court, p. 14), the banks argue that although the acquired bank could not be reconstituted as a viable concern if consummation of the merger were permitted, effective relief would still be possible—be-

cause the branches of the acquired bank could, perhaps, be sold. Parceling out the acquired bank's branches among several other banks is, however, not the equivalent of divestiture of the acquired bank, and is hardly likely to restore the competition eliminated by the merger. Not only would such a remedy leave the acquiring bank in control of much of the acquired bank's business, but it is pure conjecture that the branches could be sold, as the banks hypothesize, in such fashion as to facilitate the entry of one or more banks of the same competitive strength as the acquired bank. The normal remedy in a merger case is divestiture of the acquired firm *as a going concern;* defendants candidly admit that such a solution will be impossible if consummation of the merger is permitted.

Nor is there any merit to the suggestion that the government is unlikely to prevail on the merits of its complaint because the defendant banks have already produced evidence that the merger is necessary to meet the convenience and needs of the community, and the government has not attempted to rebut it. In its pre-trial reply brief (reproduced as an appendix to the defendant banks' memorandum in opposition to the stay), the government made clear that it was "not in a position to inform" the trial court whether it accepted defendants' allegations with respect to convenience and needs, because defendants had not furnished "any source for the facts upon which" the allegations were based (p. 12). The first pre-trial order (also appended to the memorandum in opposition) likewise makes clear that the government may

raise such additional factual issues as discovery may disclose (pp. 2–3). The defendants' case on convenience and needs is far from being conceded by the government.

In practical terms of effective antitrust enforcement in the bank merger area, no question is more important than the standards governing stays *pendente lite.* We recognize that under the Expediting Act this Court is rarely a proper forum for the decision of such questions. *United States* v. *FMC Corp.,* 11 L. Ed. 2d 20 (opinion of Mr. Justice Goldberg in chambers). Here, however, the district courts' rulings on the continuation of the statutory stay are embodied in their final judgments dismissing the complaint and hence are properly before the Court. Clarification is urgently needed to guide future proceedings in the present cases as well as the many others under the Bank Merger Act of 1966 that are pending or in prospect. Specifically, we ask the Court to make clear (1) that reversal of the judgment of dismissal in each of the present cases reinstates automatically the statutory stay, and (2) that the burden on the defendant banks in seeking to dissolve the stay is a heavy one and is not satisfied by the showing heretofore made by them in the present proceedings.

CONCLUSION

The judgments below should be reversed and the cases remanded for further proceedings.

Respectfully submitted.

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FEBRUARY 1967.

APPENDIX A

Statutes Involved

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in pertinent part:

> That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Section 18(c) of the Bank Merger Act of 1966, 80 Stat. 7, 12 U.S.C.A. 1828(c), provides:

> "(c)(1) Except with the prior written approval of the responsible agency, which shall in every case referred to in this paragraph be the Corporation, no insured bank shall—
>
> "(A) merge or consolidate with any noninsured bank or institution;
>
> "(B) assume liability to pay any deposits made in, or similar liabilities of, any noninsured bank or institution;
>
> "(C) transfer assets to any noninsured bank or institution in consideration of the assumption of liabilities for any portion of the deposits made in such insured bank.
>
> "(2) No insured bank shall merge or consoli-

date with any other insured bank or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured bank except with the prior written approval of the responsible agency, which shall be—

"(A) the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a District bank;

"(B) the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank is to be a State member bank (except a District bank);

"(C) the Corporation if the acquiring, assuming, or resulting bank is to be a nonmember insured bank (except a District bank).

"(3) Notice of any proposed transaction for which approval is required under paragraph (1) or (2) (referred to hereafter in this subsection as a 'merger transaction') shall, unless the responsible agency finds that it must act immediately in order to prevent the probable failure of one of the banks involved, be published—

"(A) prior to the granting of approval of such transaction,

"(B) in a form approved by the responsible agency,

"(C) at appropriate intervals during a period at least as long as the period allowed for furnishing reports under paragraph (4) of this subsection, and

"(D) in a newspaper of general circulation in the community or communities where the main offices of the banks involved are located, or, if there is no such newspaper in any such community, then in the newspaper of general circulation published nearest thereto.

"(4) In the interest of uniform standards, before acting on any application for approval

of a merger transaction, the responsible agency, unless it finds that it must act immediately in order to prevent the probable failure of one of the banks involved, shall request reports on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection. The reports shall be furnished within thirty calendar days of the date on which they are requested, or within ten calendar days of such date if the requesting agency advises the Attorney General and the other two banking agencies that an emergency exists requiring expeditious action.

"(5) The responsible agency shall not approve—

"(A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

"(B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

"(6) The responsible agency shall immediately notify the Attorney General of any approval by it pursuant to this subsection of a proposed merger transaction. If the agency

has found that it must act immediately to prevent the probable failure of one of the banks involved and reports on the competitive factors have been dispensed with, the transaction may be consummated immediately upon approval by the agency. If the agency has advised the Attorney General and the other two banking agencies of the existence of an emergency requiring expeditious action and has requested reports on the competitive factors within ten days, the transaction may not be consummated before the fifth calendar day after the date of approval by the agency. In all other cases, the transaction may not be consummated before the thirtieth calendar day after the date of approval by the agency.

"(7)(A) Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issues presented.

"(B) In any judicial proceeding attacking a merger transaction approved under paragraph (5) on the ground that the merger transaction alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2), the standards applied by the court shall be identical with those that the banking agencies are directed to apply under paragraph (5).

"(C) Upon the consummation of a merger transaction in compliance with this subsection and after the termination of any antitrust litigation commenced within the period prescribed in this paragraph, or upon the termination of such period if no such litigation is commenced

therein, the transaction may not thereafter be attacked in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2), but nothing in this subsection shall exempt any bank resulting from a merger transaction from complying with the antitrust laws after the consummation of such transaction.

"(D) In any action brought under the antitrust laws arising out of a merger transaction approved by a Federal supervisory agency pursuant to this subsection, such agency, and any State banking supervisory agency having jurisdiction within the State involved, may appear as a party of its own motion and as of right, and be represented by its counsel.

"(8) For the purposes of this subsection, the term 'antitrust laws' means the Act of July 2, 1890 (the Sherman Antitrust Act, 15 U.S.C. 1–7), the Act of October 15, 1914 (the Clayton Act, 15 U.S.C. 12–27), and any other Acts in pari materia.

"(9) Each of the responsible agencies shall include in its annual report to the Congress a description of each merger transaction approved by it during the period covered by the report, along with the following information:

"(A) the name and total resources of each bank involved;

"(B) whether a report was submitted by the Attorney General under paragraph (4), and, if so, a summary by the Attorney General of the substance of such report; and

"(C) a statement by the responsible agency of the basis for its approval."

(b) Section 18 of such Act is further amended by adding at the end thereof the following new subsection:

"(i)(1) No insured State nonmember bank (except a District bank) shall, without the prior consent of the Corporation, reduce the amount or retire any part of its common or preferred capital stock, or retire any part of its capital notes or debentures.

"(2) No insured bank shall convert into an insured State bank if its capital stock or its surplus will be less than the capital stock or surplus, respectively, of the converting bank at the time of the shareholder's meeting approving such conversion, without the prior written consent of—

"(A) the Comptroller of the Currency if the resulting bank is to be a District bank;

"(B) the Board of Governors of the Federal Reserve System if the resulting bank is to be a State member bank (except a District bank);

"(C) the Corporation if the resulting bank is to be a State nonmember insured bank (except a District bank).

"(3) Without the prior written consent of the Corporation, no insured bank shall convert into a noninsured bank or institution.

"(4) In granting or withholding consent under this subsection, the responsible agency shall consider—

"(A) the financial history and condition of the bank,

"(B) the adequacy of its capital structure,

"(C) its future earnings prospects,

"(D) the general character of its management,

"(E) the convenience and needs of the community to be served, and

"(F) whether or not its corporate powers are consistent with the purposes of this Act."

SEC. 2. (a) Any merger, consolidation, acquisition of assets, or assumption of liabilities

involving an insured bank which was consummated prior to June 17, 1963, the bank resulting from which has not been dissolved or divided and has not effected a sale or distribution of assets and has not taken any other similar action pursuant to a final judgment under the antitrust laws prior to the enactment of this Act, shall be conclusively presumed to have not been in violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2).

(b) No merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank which was consummated after June 16, 1963, and prior to the date of enactment of this Act and as to which no litigation was initiated by the Attorney General prior to the date of enactment of this Act may be attacked after such date in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2).

(c) Any court having pending before it on or after the date of enactment of this Act any litigation initiated under the antitrust laws by the Attorney General after June 16, 1963, with respect to the merger, consolidation, acquisition of assets, or assumption of liabilities of an insured bank consummated after June 16, 1963, shall apply the substantive rule of law set forth in section 18(c)(5) of the Federal Deposit Insurance Act, as amended by this Act.

(d) For the purposes of this section, the term "antitrust laws" means the Act of July 2, 1890 (the Sherman Antitrust Act, 15 U.S.C. 1–7), the Act of October 15, 1914 (the Clayton Act, 15 U.S.C. 12–27), and any other Acts in pari materia.

SEC. 3. Any application for approval of a merger transaction (as the term "merger transaction" is used in section 18(c) of the Federal Deposit Insurance Act) which was made before the date of enactment of this Act, but was withdrawn or abandoned as a result of any objections made or any suit brought by the Attorney General, may be reinstituted and shall be acted upon in accordance with the provisions of this Act without prejudice by such withdrawal, abandonment, objections, or judicial proceedings.

APPENDIX B

United States District Court for the Southern District of Texas (Houston Division)

Civil Action No. 66–H–695

UNITED STATES OF AMERICA, PLAINTIFF

v.

FIRST CITY NATIONAL BANK OF HOUSTON AND SOUTHERN NATIONAL BANK OF HOUSTON, DEFENDANTS

(Filed October 19, 1966)

COMPLAINT

The United States of America, plaintiff, by its attorneys, acting under the direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against the above-named defendants, and complains and alleges as follows:

I. JURISDICTION AND VENUE

1. This complaint is filed and this action is instituted under Section 15 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 736, as amended (15 U.S.C. § 25), commonly known as the Clayton Act, in order to prevent and restrain the violation by the defendants, as hereinafter alleged, of Section 7 of the Clayton Act, 38 Stat. 731, as amended by the Act of Congress of December 29, 1950, c. 1184, 64 Stat. 1125 (15 U.S.C. § 18).

2. Each of the defendants has its principal place of business, transacts business, and is found within the Southern District of Texas.

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II. THE DEFENDANTS

3. First City National Bank of Houston, hereinafter referred to as "First City," is made a defendant herein. First City is a national banking association organized under the laws of the United States of America, with its principal place of business in Houston, Texas.

4. Southern National Bank of Houston, hereinafter referred to as "Southern National," is made a defendant herein. Southern National is a national banking association organized under the laws of the United States of America, with its principal place of business in Houston, Texas.

III. TRADE AND COMMERCE

5. Commercial banks fill an essential and unique role in the Nation's economy. Their principal functions are the acceptance of deposits for safekeeping and convenience in making payments by check, the granting of loans or advances of funds to individuals and business firms, and the creation through demand deposits of net additions to the supply of money. Most money payments in the United States are made through checks drawn against demand deposits and the creation and holding of such deposits is a function peculiar to commercial banks and one which makes them to a great extent the administrators of the Nation's check payment system. Through the making of loans to individuals and businesses, commercial banks supply a significant part of the credit requirements of the Nation's economy. Commercial banks also accept time deposits from various types of depositors and provide a wide variety of other financial services, including personal and corporate trust accounts, the collection of drafts, bills, and other commercial instruments; the acceptance of bills of ex-

change; the issuance of letters of credit; the sale of cashier's checks, and drafts on correspondent banks; the purchase or sale of securities for customers; the sale of foreign exchange; and the renting of safety deposit boxes. This combination of services is unduplicated by other financial institutions.

6. Commercial banks, because of the importance of bank credit to business and other borrowers and the close relationship of banks with many such borrowers, and because of their holdings of stock in trust accounts, have an important influence on competition in all branches of industry and commerce served by the banking system.

7. Commercial banking in Harris County, the home county of First City and Southern National, and in the five-county area of Harris, Brazoria, Fort Bend, Liberty, and Montgomery counties (referred to hereinafter as "Houston metropolitan area") is heavily concentrated in a few banks. As of December 31, 1965, the five largest commercial banks in Harris County (all of which are located in downtown Houston) accounted for approximately 67.2% of the total assets, 66.3% of the total deposits, and 65.2% of the total loans and discounts of the 85 commercial banks located in Harris County as of that date. As of the same date, the five largest banks in the Houston metropolitan area (all of which are located in downtown Houston) accounted for approximately 64.0% of the total assets, 63.0% of the total deposits, and 62.4% of the total loans and discounts of the 115 commercial banks located in the Houston metropolitan area as of that date. In addition, many of the smaller commercial banks in Harris County and the Houston metropolitan area, including many which have been opened since 1955, are affiliated or closely associated with one or another of the large downtown

Houston banks through common stock ownership or personnel interlocks, thus further increasing concentration in commercial banking in Harris County and in the Houston metropolitan area.

8. The high degree of concentration existing in Harris County and the Houston metropolitan area is in large part a direct result of past mergers, acquisitions, and consolidations among commercial banks in the area. Four mergers since 1952 have resulted in what are at the present time the first, second and fourth ranking commercial banks in Harris County and the Houston metropolitan area.

9. First City is the product of a number of mergers, consolidations or acquisitions. The merger of City National Bank and First National Bank in 1956 resulted in First City becoming the largest commercial bank in Houston.

10. First City is the largest commercial bank in Harris County and in the Houston metropolitan area. As of December 31, 1965, First City accounted for approximately $966 million (24.3%) of the total assets, $850 million (24.6%) of the total deposits, and $426 million (19.8%) of the total loans and discounts of all commercial banks in Harris County. As of the same date, First City accounted for approximately 23.2% of the total assets, 23.4% of the total deposits, and 19.0% of the total loans and discounts of all commercial banks in the Houston metropolitan area. In addition, at least ten smaller commercial banks in Harris County with aggregate deposits of approximately $188 million are affiliated or closely associated with First City through common stock ownership or personnel interlocks. As of December 31, 1965, First City and the smaller banks affiliated or closely associated with it accounted for approximately 29.6% of the total deposits of all commercial banks in Harris

County, and approximately 28.2% of the total deposits of all commercial banks in the Houston metropolitan area.

11. Southern National is the sixth largest commercial bank in Harris County and in the Houston metropolitan area. As of December 31, 1965, Southern National accounted for approximately $81 million (2.0%) of the total assets, $66 million (2.1%) of the total deposits, and $45 million (2.2%) of the total loans and discounts of all commercial banks in Harris County. As of the same date, Southern National accounted for approximately 1.9% of the total assets, 2.0% of the total deposits, and 2.1% of the total loans and discounts of all commercial banks in the Houston metropolitan area. In addition, at least two smaller commercial banks in Harris County with aggregate deposits of about $26 million are affiliated or closely associated with Southern National through common stock ownership or personnel interlocks. As of December 31, 1965, Southern National and the smaller banks affiliated or closely associated with it accounted for approximately 2.8% of the total deposits of all commercial banks in Harris County, and approximately 2.6% of the total deposits of all commercial banks in the Houston metropolitan area.

12. If the proposed merger of First City and Southern National is consummated, the resulting bank would account for approximately 26.3% of the total assets, 26.7% of the total deposits, and 22.0% of the total loans and discounts of all commercial banks in Harris County, and approximately 25.1% of the total assets, 25.4% of the total deposits, and 21.1% of the total loans and discounts of all commercial banks in the Houston metropolitan area. In addition, the resulting bank and the approximately twelve smaller banks which are presently affiliated or closely associ-

ated with First City or Southern National would account for at least 32.4% of the total deposits of all commercial banks in Harris County, and at least 30.8% of the total deposits of all commercial banks in the Houston metropolitan area.

13. If the proposed merger of First City and Southern National is consummated, the five largest commercial banks in the Houston metropolitan area would account for approximately 69.2% of the total assets, 68.4% of the total deposits, and 67.4% of the total loans and discounts of all commercial banks in Harris County, and approximately 65.9% of the total assets, 65.0% of the total deposits, and 64.5% of the total loans and discounts of all commercial banks in the Houston metropolitan area. In addition, the five largest banks in the Houston metropolitan area and the smaller banks which are presently affiliated or closely associated with one or another of these banks would account for approximately 78.0% of the total deposits of all commercial banks in Harris County, and approximately 74.0% of the total deposits of all commercial banks in the Houston metropolitan area.

14. First City and Southern National compete with each other and with other commercial banks in Harris County and the Houston metropolitan area in offering and performing commercial banking services and activities. First City and Southern National are each substantial competitors in commercial banking in Harris County and in the Houston metropolitan area and there is substantial competition between them in commercial banking in each of these areas.

15. Customers of First City and Southern National have regularly utilized interstate communications, including the mails, telephone and telegraph to carry on their business with, apply for, and obtain the services provided by these banks. First City and Southern National have regularly utilized interstate communi-

cations, including the mails, telephone and telegraph, to conduct business with customers, and with other banks located in states other than Texas. First City and Southern National have received substantial amounts of funds from customers and correspondents located in states other than Texas and have made loans of substantial amounts to customers located in states other than Texas. First City and Southern National are each engaged in interstate commerce.

IV. OFFENSE CHARGED

16. Defendants First City and Southern National have entered into an agreement which was approved by the Boards of Directors of First City and Southern National, respectively, on or about May 12, 1966 and by the stockholders of each defendant bank on or about June 16, 1966, and which, if carried out, will result in a merger of Southern National with and into First City under the charter of First City and with the title of First City National Bank of Houston.

17. The effect of the merger of First City and Southern National, pursuant to the agreement described in paragraph 16 above, may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act.

18. The offense alleged in this complaint will be carried out and will continue unless the relief hereinafter prayed for is granted.

V. EFFECTS

19. The offense alleged in this complaint, if carried out and continued, will have the following effects, among others:

(a) competition between the defendants will be permanently eliminated;

(b) competition generally in commercial banking in Harris County and in the Houston metropolitan area will be substantially lessened and a tendency to monopoly created; and

(c) concentration in commercial banking in Harris County and in the Houston metropolitan area will be substantially increased.

PRAYER

Wherefore, plaintiff prays—

1. That the merger agreement described in paragraph 16 of this complaint be adjudged to be unlawful, in violation of Section 7 of the Clayton Act.

2. That defendants and all persons acting on their behalf be enjoined from carrying out the aforesaid agreement of merger or any similar plan or agreement, the effect of which would be to merge, consolidate, or in any other way combine the business of said defendants.

3. That the plaintiff have such other and further relief as the Court may deem just and proper.

4. That plaintiff recover the costs of this action.

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Acting Attorney General,

DONALD F. TURNER,
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APPENDIX C

I

SUPPLEMENTAL DECISION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION TO MERGE FIRST CITY NATIONAL BANK, HOUSTON, TEXAS, AND SOUTHERN NATIONAL BANK, HOUSTON, TEXAS, DECEMBER 1, 1966.

This supplements our opinion of November 10, 1966 on the application for the merger of First City National Bank and Southern National Bank, both of Houston, Texas. On July 1, 1966, a recommendation to approve the merger was received from the Regional Administrator of National Banks for that (the 11th) District forwarding a report of investigation from the Chief Bank Examiner. The substance of the examination report was that the merger would have little, if any, competitive impact and that the merger would be very beneficial to the Houston metropolitan area. Reports were received on the competitive effect of the proposal from the Department of Justice (7/26/66)—substantially adverse; the Federal Reserve Board (7/25/66)—adverse; and the Federal Deposit Insurance Corporation (8/26/66)—not substantially adverse. After careful consideration of all representations, the appropriate officials in this Office recommended favorable consideration of the application to the Comptroller. On September 20, 1966, the then Comptroller, James J. Saxon, approved the merger for reasons, among others, set forth in the aforementioned November 10, 1966 opinion. On October 18, 1966, the Department of Justice brought suit alleging violation of Section 7 of the Clayton Act.

On October 26, 1966, this Office intervened in the suit and immediately moved against the pleading. This opinion is intended to supplement the findings of the former Comptroller and to affirm the position assumed under the Bank Merger Act of 1966[1] in his administration.

SECTION OF THE COUNTRY

The first antitrust criterion imposed by the statute is the establishment of an appropriate geographical market within which to measure the effects of the proposed merger. In *United States v. Philadelphia National Bank*[2] the Supreme Court established certain general rules:

> Therefore, since, as we recently said in a related context, the "area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, *and to which the purchaser can practicably turn for supplies*", * * * the four county area * * * would seem to be the relevant geographical market (p. 359).
>
> We recognize that the area in which appellees have their offices does not delineate with

[1] (5) The responsible agency shall not approve—

* * * * * * *

(B) Any * * * proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions, and the convenience and needs of the community to be served.

[2] 374 U.S. 321 (1963).

perfect accuracy an appropriate "section of the country" in which to appraise the effect of the merger upon competition. Large borrowers and large depositors, the record shows, may find it practical to do a large part of their banking business outside their home community; very small borrowers and depositors may, as a practical matter, be confined to bank offices in their immediate neighborhood; and customers of intermediate size, it would appear, deal with banks within an area intermediate between these extremes * * *. So also, some banking services are evidently more local in nature than others. But that in banking the relevant geographical market is a function of each separate customer's economic scale means simply that a workable compromise must be found; some fair intermediate delineation which avoids the indefensible extremes of drawing the market either so expansively as to make the effect of the merger upon competition seem insignificant, because only the very largest bank customers are taken into account in defining the market, or so narrowly as to place appellees in different markets, because only the smallest customers are considered. We think that the four county Philadelphia metropolitan area, which state law apparently recognizes as a meaningful banking community in allowing Philadelphia banks to branch within it, and which would seem roughly to delineate the area in which bank customers that are neither very large nor very small find it practical to do their banking business, is a more appropriate section of the country in which to appraise the instant merger than any larger or smaller or different area * * *. We

are helped to this conclusion by the fact that the three federal banking agencies regard the area in which banks have their offices as an "area of effective competition."

[37] * * * As a practical matter the small business man can only satisfy his credit needs at local banks. To be sure, there is still some artificiality in deeming the four-county area the relevant section of the country so far as businessmen located near the perimeter are concerned. But such fuzziness would seem inherent in any attempt to delineate the relevant geographical market * * * and it is notable that outside the four-county area, appellees combined individual business rapidly thins out. Thus, the other six counties of the Delaware Valley account for only 2% of appellees' combined individual demand deposits; 4% of demand deposits of partnerships and corporations; 7% of loans; 2% of savings deposits; 4% of business time deposits (pp. 360–362).

These guidelines can only, of course, be generally accepted. Where statewide branching is permitted it would certainly be inappropriate to measure the impact of a merger only in the four corners of the state where each may, perchance, have some small branches. At the other extreme, in unit banking states, the market should not be restricted to the streets immediately adjacent to the merging institutions but must be extended to that area encompassing the geographic natural limitations of the intermediate customers of of whom the court speaks. We have interpreted the term "section of the country" as used in the opinion to mean a practicable socio-economic entity of a size not less than a metropolitan area[a] equivalency. We have taken the reference to "small businessmen", in the footnote, to equate with the expression "bank cus-

[a] Brown Shoe Co. v. United States, 370 U.S. 294 (1962). "Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area" (p. 337).

tomers that are neither very large nor very small" in the text. For it is the experience of bankers that the two thousand dollar inventory loan for the corner shoe store is as restricted to the neighborhood bank as is the two thousand dollar car loan or three hundred dollar checking account of the small individual customer.

Accordingly, the smallest "section of the country" which we will consider in testing the competitive effects of this transaction, is the Standard Metropolitan Statistical Area (SMSA) which was conceived in the U.S. Bureau of the Budget and is administered by the U.S. Bureau of the Census:

> The general concept adopted in defining a standard metropolitan area [is] that of an integrated economic area with a large volume of daily travel and communication between a central city of 50,000 inhabitants or more and the outlying parts of the area * * *. Each area * * * consists of one or more entire counties.[4]

The intermediate sized customer to which the Court addressed itself in *Philadelphia National Bank,* we have taken to include depositors and borrowers in the range of $10,000–$100,000 on the somewhat arbitrary assumption that customers of smaller size are restricted to neighborhod banks and customers of larger size fall within a national market range. The Department of Justice objects to this upper categorization, representing that the majority of such accounts are generally nevertheless from customers with local addresses. This objection, however, misconceives the nature of the distinction. As a matter of sheer inertial convenience, many accounts will be placed at the nearest large bank. This is not to say that they cannot readily and reasonably flow to banks in other met-

[4] II U.S. Bureau of the Census, U.S. Census of Business, 1954, p. 3. Quoted in Brown Shoe, supra, p. 298.

ropolitan areas should local services, interest payments, or costs get out of line with national figures. The relative ease with which such accounts may shift from market to market renders them largely immune to the effects of purely local trends towards concentration and therefore requires consideration in a greatly expanded market area. A purely local oligopoly has not the power to extract artificially high profits or to sustain inefficient or inferior services to a customer with the ability to shift banking connections at will. One hundred thousand dollars is a generally accepted figure at which banks seek business connections with enterprises located in distant parts of the country. We adopt it as a point at which a customer may be considered national in scope, recognizing that a considerably smaller figure is acceptable for certain very desirable types of business, while some volatile, "heavy traffic" business will not be sought out unless the volume is considerably higher.

In *Philadelphia National Bank, supra,* the Supreme Court departed from the SMSA concept somewhat by restricting its market to the four counties comprising and immediately contiguous to Philadelphia on the basis of what it understood to be special circumstances; i.e., the limitation of branching to the four counties, the state boundary between Philadelphia and three of the counties in the SMSA and, probably principally, because the fragmentary statistics available as to customer locus tended to show that Philadelphia bank penetration of these counties was minimal. The general impact of this type of evidence is, of course, to negative the conclusion of the Bureau of the Census that the SMSA established by it is "an integrated economic area." We will consider these factors when present, but we are inclined to give presumptive weight to the conclusions of the experts at the Bureau

of the Census as to the enormously complex resolution of the structure of economic units.

PRODUCT MARKET

There is no line of commerce standard set out in BMA-66 in contradistinction to earlier antitrust statutes. We believe that this omission is calculated and reflects a congressional intent that all financial institutions must be considered in evaluating the competitive impact of a proposed merger—that is, the product market is not restricted to commercial banks as was the case under Clayton Section 7 but encompasses all businesses which compete in one or more of the congeries of services offered by the banks under our supervision. Our reasoning to this end is articulated in our briefs in support of our motions to dismiss in this and other cases. It will not be repeated here. We note that dicta in the recent opinion of Judge Miller in *United States* v. *Third National Bank of Nashville et al.* (slip opinion already supplied the Court) is contra to our conclusion.

WHOSE EFFECT MAY BE SUBSTANTIALLY TO LESSEN COMPETITION

We again advert to the Supreme Court's opinion in *Philadelphia National Bank* as a logical starting point to our inquiry into the general competitive standards to be applied in bank merger inquiries.

> We noted in Brown Shoe Co., supra (370 U.S. at 315) that "[t]he dominant theme pervading congressional consideration of the 1950 amendments [to Section 7] was a fear of what was considered to be a rising tide of economic concentration in the American economy." This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market

structure, market behavior, or probable anticompetitive effects (pp. 362–363).

[O]urs is essentially a decentralized system of community banks. Recent years, however, have witnessed a definite trend towards concentration. Thus, during the decade ending in 1960 the number of commercial banks in the United States declined by 714, despite the chartering of 887 new banks and a very substantial increase in the Nation's credit needs during the period. Of the 1601 independent banks which thus disappeared, 1503, with combined total resources of well over $25,000,000,000, disappeared as the result of merger (pp. 325–326).

The present size of both Philadelphia National Bank and Girard is in part the result of mergers. Indeed, the trend towards concentration is noticeable in the Philadelphia area generally, in which the number of commercial banks has declined from 108 in 1947 to the present 42. Since 1950 Philadelphia National Bank has acquired nine formerly independent banks and Girard six, and these acquisitions have accounted for 59% and 85% of the respective banks' asset growth during the period, 63% and 91% of their deposit growth and 12% and 37% of their loan growth. During this period, the seven largest banks in the area increased their combined share of the area's total commercial bank resources from about 61% to about 90% (p. 331).

Of equally little value, we think, is the assurance offered by appellees' witnesses that customers dissatisfied with the services of the resulting bank may readily turn to the 40 other banks in the Philadelphia area. In every case short of outright monopoly, the disgruntled customer has alternatives; even in tightly oligopolistic markets, there may be small firms operating. A fundamental purpose of amending Section 7 was to arrest the trend towards con-

centration, the *tendency* to monopoly, before the consumers' alternatives disappeared through merger, and that purpose would be ill-served if the law stayed its hand until 10, or 20, or 30 more Philadelphia banks were absorbed. This is not a fanciful eventuality, in view of the strong trend toward mergers evident in the area, see p. 331, supra; and we might note also that entry of new competitors into the banking field is far from easy (Court's emphasis) (p. 367).

One difficulty the court found in its legislative analysis was the fact that its prior decisions had limited the application of Clayton Section 7, in bank mergers, to stock acquisitions only and that the amendment in 1950 was, in terms, restricted only to "corporations subject to the FTC" (which excludes banks). The Court overcame this impediment by holding that

> The stock acquisition provision of Section 7 though reenacted in haec verba by the 1950 amendment, *must be deemed expanded in its new context* to include, at the very least, acquisition by merger or consolidation (emphasis supplied) (p. 346).

Similarly, we believe that the competitive criteria to be utilized in evaluating bank mergers under the standards of BMA–66 even though largely a reenactment in haec verba of previous antitrust standards must be deemed changed in this new context. Under Section 7 of BMA–66 the 2200[8] bank mergers which had taken place subsequent to the 1950 amendment to Clayton Section 7 were immunized from future prosecution on any antitrust ground other than monopolization. This stabilization of the status quo in banking as of February 1966 evidenced a congressional satisfaction or tolerance of the level of concen-

[8] From 1500 at the time of Philadelphia National Bank.

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tration then extant in banking generally. Thus the finding of the Court that an unacceptable level of concentration was developing in banking and its conclusion that the 1950 amendment to the Clayton Act evidenced a congressional intent to reduce this tendency must be taken—in banking—to have been modified in its new (BMA–66) context.

Indeed, we conceive that this is no more than congressional recognition of a business reality. In *every* SMSA in excess of 300,000 persons, the same economic pattern repeats itself. There are one to five large banks in the community which possess a substantial majority of assets. These are accompanied by a scattering of a few to more than a hundred small banks serving localities within the community in a limited manner. A 1964 study in hand reveals that in the 62 SMSA's over 300,000 in population which permit branching (more than 50% of all commercial bank deposits)* the least concentrated shows 55.1% of assets in the hands of the five largest banks while the *average* concentration ratio for the five largest banks was 79%.

Thus we believe that the antitrust standards as to acceptable *levels* of concentration must be adjusted to norm for *this* industry. Further, we concur that tendencies toward monopoly are to be equally condemned once it is established what factors establish the existence of such trend.

* While comparable statistics are not completely available for the 23 (300,000+) remaining SMSA's which are located in states permitting only unit banking, an arithmetic average shows the average largest unit bank with 28.7% and the *three* largest averaging 59.4% of SMSA deposits.

CONVENIENCE AND NEEDS

We view these standards as reflecting no more than the traditional banking criteria for or against a proposed consolidation or branch or charter which this Office has been evaluating for more than one hundred years. We note, however, that this factor, which can overcome a substantially anticompetitive result, changes the geographic focus of inquiry. For while the antitrust standards are national in scope, in that while they are to be measured in an appropriate geographic area, no particular import is to be given competitive advantages flowing from a given course of conduct to one or another area; in "convenience and needs" our inquiry is directed to advantages and disadvantages flowing to a particular community. Thus, it is no answer to an objection here that the needs of a business may be served by an institution located elsewhere when such other service has a deleterious impact "on the community to be served." Specifically, that a business can go elsewhere to secure its financing may be a sufficient answer to a competitive justification for a merger; but that the community which has been deprived of that banking business has suffered in some discernable manner may be sufficient grounds to—nevertheless—sustain that same merger.

THIS MERGER, SECTION OF THE COUNTRY

As the appropriate section of the country within which to measure the effects of this merger on the class of customers which the Supreme Court conceives are primarily affected by mergers of this size, we have selected the Houston SMSA, the contiguous counties of Harris, Liberty, Brazoria, Chambers and

Fort Bend. In general support of the U.S. Bureau of the Census' designation of this area as an economic unit, we note that the most recent labor survey in the area demonstrated that more than one in five non-agricultural workers in the other four counties commuted to work in Harris County. The Manned Space Center south of Houston just completed in 1962, and the still embryonic Humble industrial and residential complex surrounding it, can but have the effect of enhancing this area focus on Houston and its environs.

Any objection that the 1965 change in SMSA from Harris to Harris plus four counties somehow negatives the inference of economic cohesion which arises from its structuring is, we think, misconceived. We think that the restructuring of the SMSA within the past year evidences a recent examination of the conditions present in the Houston metropolitan area by qualified economists at the Bureau of the Census. The very timeliness of the change helps to assure us that the geographic market selected is currently responsible. In the absence of evidence to the contrary, and in light of the supportive data cited above we believe the appropriate market to be that selected by the responsible government agency.

PRODUCT MARKET

As indicated earlier, we view the appropriate product market to include all financial institutions doing business in the SMSA. As of December 31, 1963 there were 115 commercial banks in the SMSA with 3.9 billion dollars in combined deposits. There were 20 savings and loan institutions with about 760 million dollars in deposits, some 240 credit unions with assets of more than 121 million in 1964, 3 large mortgage placement companies, many small loan and finance

companies and a large number of local and national insurance companies, to say nothing of the Federal government's direct lending agencies which had more than 630 million in outstanding loans in the Houston SMSA in 1965. According to a 1955 Federal Reserve Board study, New York banks alone had 375 million dollars in loans outstanding in the Houston area.

Although precise quantitative data cannot be secured as to the universe of this competition, we have adopted a conservative rule of thumb that the comprehensive figures available as to commercial banks should be, in this market, halved, in order to incorporate the impact of the "other financial institutions."

WHOSE EFFECT MAY BE SUBSTANTIALLY TO LESSEN COMPETITION

Two basic inquiries in evaluating the likelihood that a merger might "lessen competition" are (1) is the product and geographic market already over-concentrated, and (2) is the market structure *tending* towards monopoly or oligopoly.

A study of the actual banking market throughout the country reveals a structural pattern which differs markedly from that of nonfinancial businesses. It helps to explain why the specialty of banking has been recognized by the enactment of particular merger legislation.

The study discussed supra, which relates to more than one-half of all commercial bank assets in the United States, shows that the *five* largest banks in those 62 SMSA's average 79% of all area deposits and that the *average single* largest bank has 29.3% of area deposits.

There is no evidence that the Houston SMSA is over-concentrated, indeed, the statistics show a level of concentration well below national *averages*. Nor

do the facts reveal a tendency *towards* concentration. To the contrary, as the ensuing chart demonstrates, concentration of commercial bank assets (approximately the same relationships obtained for deposits and loans) has consistently dropped over the last ten years.

Number of banks	Percent concentration, 1956	Percent concentration, 1965
1	29.2	23.16
2	45.9	41.6
3	62.6	57.44
4	73.1	61.96
5	75.8	63.96
10	82.0	71.6

The absolute number of banks in the SMSA has almost doubled since 1955 from 66 to 115. Thus, it is clear that the market is not overly concentrated now, nor is it trending that way. The increase of slightly less than 2% in asset size of First City which would attend this merger compares favorably with its drop of more than 6% over the last ten years.

Lastly, we categorically reject the suggestion that "affiliates" should be considered competitively within the ambit of a central city bank's market shares. In the context of this case, an affiliate is to be understood to be a bank 50% or more owned by a group of stockholders who also own 50% or more of the stock of a larger bank. This peculiar, aberrational outgrowth of unit banking creates relationships between banks which are stronger than that of correspondents, but considerably weaker than branch status. Initially, there is of course no bank to bank link. The majority stockholders who also own a majority of the central city bank have a fiduciary duty to the minority stockholders to always act in their—not the central bank's

—best interest. The local board of directors has a responsibility to the depositors and the community which the bank serves which they cannot be presumed to shirk.

Based upon the foregoing, I find that the proposed merger would have the effect of lessening competition in the Houston SMSA. Indeed, the acquisition of any significant entrant by the largest financial institution in the community could hardly be expected to have any other effect.

I do not believe, however, that this effect can be conceived as either actually or probably *substantially* anticompetitive. The level of concentration obtaining in the Houston SMSA is comfortably below national *averages* and will remain so after this merger. The long term trend in the community demonstrates a strong and continuing pattern of deconcentration of banking assets. Finally, the entry of some 49 new banks in the last 10 years has conclusively established an ease of entry which should still any fears that loss of one 2 percent entrant could seriously affect the options of the \$10–\$100,000 customer whose needs could be served by a major portion of the 115 banks still extant in the market after the merger.

We therefore need not reach the further question of the "convenience and needs of the community to be served."

But even if we had viewed the competitive factors as substantially adverse, we would, nevertheless, have approved the merger. For we conceive that the manifold advantages accruing to the Houston area as a result of this merger are so pervasive and substantial as to outweigh the competitive impediments now postulated.

CONVENIENCE AND NEEDS OF THE COMMUNITY TO BE SERVED

The growth of Houston over the last 45 years has been explosive. Between 1920 and 1960 it grew some 678% *or 4 times* the national percentage of 169.6%. This dynamic growth pattern has a sound economic base substantially and chronologically in cotton, cattle, timber, shipping, manufacturing, oil and petrochemicals. The city has leaped from census to census from 45th, to 27th, to 21st, to 14th, to 7th and now to 6th largest city in the country. It is now our third largest port, the largest city in the south and southwest, and the single most important center of the oil and petrochemical industries. Somewhat characteristically of an explosive growth situation, there has developed in Houston something of a capital pinch not unlike that obtaining in a business undergoing similar growth. Thus, while the population of the Houston SMSA grew some 83.1% between 1950–1964 or some 314% greater than United States total population growth of 26.4%, the deposit growth of SMSA commercial banks was only 131.64% or 63.4% higher than total United States growth of 83.48%. This surging growth pattern will maintain Houston as a net capital importer through the foreseeable future. Thus, we have a community with capital needs and sophistication of banking services required which considerably outstrip the lagging financial structure in the community. As the third largest port in the country, Houston should have at least two banks with substantial international departments—it now has none. It is the opinion of the National Bank Examiner who oversees the activities of First City that its Trust and Investment Departments are also inadequate to the sophisticated needs of the large business interests in the community. While it is true that

banks elsewhere stand ready and willing to provide such services, the expatriation of the funds and in some instances the business which the use of these banks might entail is not in the best interest of Houston—which the statute establishes as the ultimate end to be served. We do not subscribe to the proposition advanced by the applicants that this relatively minor acquisition (in terms of assets acquired) will, of itself, make all or any of these objectives immediately obtainable. We do conclude, however, that the attendant increase in size is a distinct factor tending measurably towards the accomplishment of these highly desirable and necessary goals.

In sum, then, in markets where the needs of the community have outstripped the capabilities of local banks to expand their services out of normal growth of those institutions, we will look favorably upon such artificial stimuli as may be necessary to create a structure capable of supplying the required services.

The applicants suggest that the merger will cure a substantial management succession problem which exists at First City to the ultimate advantage of the banking community in Houston. The report of our Chief Bank Examiner for the Region tends to confirm the contention. He reports that Kline McGee, president of Southern and to be president of the merged institution, is one of the finest bankers in the southwest who "heads a well-balanced, capable and progressive staff of young bankers." He notes further that First City:

> —as a result of previous conservatism has not met its responsibilities in expanding management in keeping with the growth of the banks and Houston proper. It could be argued that it could go into the open market and bid for capable bankers and it could undoubtedly do so; however, this merger presents an oppor-

> tunity to obtain a ready-made staff of highly skilled bankers who have proved themselves in local business circles. The degree of conservatism and domination that has been exercised in the hiring of young officers and even clerks and secretaries in the charter bank is amazing. This conservatism has resulted in a dire management need on the part of the First City National Bank. It is a strong point in the application and it is indeed a favorable factor to the request.

We subscribe to the general sentiments expressed by the Examiner. Further, we note that the merger of these institutions allows the insertion of these young (average age 43) officers into the older (average age 53) officer structure of the large bank in a relatively inoffensive manner. It is common human experience that executives "brought in from outside" encounter considerably more difficulty in changing an overly-conservative business organization than obtains when the innovator comes from inside the structure. The importance of the Southern management to First City—disproportionate to the relative size of the merging unit—is underscored when we note that the *difference* between the loan/deposit ratios of First City and Southern (50% and 68.8%) would increase First City's loans (and, arguably, community service) by more than 3½ times Southern's total loan portfolio.[7]

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[7] At the time of the application, First City had deposits of $850,843,000. An increase of 18.8% in loans would amount to about $160 million or about 3.6 times Southern's loan portfolio of $44 million.

CONCLUSION

The proposed merger is not substantially anticompetitive. But even assuming it were, Houston has a demonstrated need for a more substantial banking institution capable of providing the sophisticated banking services which the extraordinary growth of the community requires. This merger will supply the largest bank in Houston with more effective management and a larger asset base from which it can program more of the community services it should be performing.

WILLIAM B. CAMP,
Acting Comptroller of the Currency.

II

OPINION OF THE OFFICE OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION TO MERGE SOUTHERN NATIONAL BANK OF HOUSTON, HOUSTON, TEXAS, INTO FIRST CITY NATIONAL BANK, HOUSTON, TEXAS, UNDER THE CHARTER AND WITH THE TITLE OF THE LATTER

STATEMENT

On June 15, 1966, Southern National Bank of Houston, Houston, Texas, with IPC deposits of $48.8 million, and First City National Bank, Houston, Texas, with IPC deposits of $626.8 million, applied to the Office of the Comptroller of the Currency for permission to merge under the charter and with the title of the latter. This opinion sets forth the bases of the decision of this Office, dated September 20, 1966.

Houston, with a metropolitan area population of approximately 1.765 million, is the center of the most

populous metropolitan area in the southwestern United States. Its Standard Metropolitan Statistical Area is defined by the Census Bureau as Harris, Brazoria, Fort Bend, Liberty and Montgomery Counties, although the city serves the entire Gulf Coast. An extraordinary combination of growth factors created a population increase of 65.9% between 1950 and 1960. Between 1960 and 1965, the Houston area population increased by 17%. The prospects are for continued growth with a projected 1970 population exceeding two million.

The genesis of Houston's amazing growth has been its economic diversity, supported by an advantageous geographical location and abundance of natural resources. Founded in 1836, Houston has, at various periods in its history, been economically supported by cotton, cattle and timber, trade and shipping, marketing and manufacturing, and petroleum and chemical refining. Each new activity has taken its place in the Houston economy without replacing its predecessor. Texas Employment Commission figures for the first quarter of 1965 show that 9.7% of Houston area workers were employed in durable goods manufacturing, 8.2% in nondurable goods manufacturing, 7.1% in transportation, 8.3% in construction, 8% in wholesale trade, 18.6% in retail trade, 5.7% in finance and insurance, 7.3% in business and personal services, 6.9% in medical and professional services, 9.3% in government, and 10.9% in other categories. The following table published in the 1963 U.S. Department of Commerce Census of Business illustrates the diversity of the Houston economy.

Manufacturing establishments, employees, and value added by major industry groups, Houston SMSA

Industry groups	Establishments, December 31, 1963	All employees, December 31, 1963	Percent of total employees	Value added, manufactures, 1963 ($000)	By percent, total value added
Manufacturing	2,197	106,059	100.0	1,889,693	100.0
Food and kindred products	187	11,221	10.6	218,786	11.6
Textile mill products	10	535	.5	3,295	.2
Apparel and related products	86	1,348	1.3	8,776	.5
Lumber and wood products	149	2,328	2.2	14,090	.7
Furniture and fixtures	80	1,663	1.6	13,263	.7
Paper and allied products	37	3,163	3.0	42,281	2.2
Printing and publishing	252	5,764	5.4	53,870	2.8
Chemical and allied products	180	16,174	15.2	601,657	31.8
Petroleum and allied products	31	10,505	9.9	321,942	17.0
Rubber and plastics products	48	1,421	1.3	14,287	.8
Stone, clay, and glass products	130	4,852	4.6	61,751	3.3
Primary metal industry	65	9,670	9.1	131,969	7.0
Fabricated metal products	306	13,611	12.8	134,498	7.1
Machinery, except electrical	400	14,890	14.0	205,542	10.9
Electrical machinery	79	2,079	2.0	27,311	1.4
Transportation equipment	68	2,141	2.0	17,809	.9
Instruments and related products	48	1,064	1.0	10,986	.6
Miscellaneous manufacturing	69	587	.6	5,337	.3
Administrative and auxiliary		2,961	2.8		
				Payroll ($000)	Sales ($000)
Wholesale trade	2,653	N.A.		171,265	2,694,963
Retail trade	13,082			190,443	1,781,921
Selected services	5,506			80,842	278,399

In addition to its variety, the Houston economy is marked by great quantitative strength. This power is particularly well illustrated in manufacturing, where Houston industries account for the following amounts of the nation's total value added: petroleum and coal products, 9%; petroleum refining, 10.6%; chemicals as a whole, 3.4%; basic chemicals, 6.9%; construction and like equipment, 5.7%; and fabricated metal products, 2.5%. The Houston area petroleum refining complex is the world's largest and its chemical industry is the nation's fastest growing.

The outlook for these industries continues to be promising because of an abuandance of hydrocarbons, salt, sulphur and lime, plus excellent transportation facilities.

Perhaps as much as any single factor, Houston's transportation facilities have played a vital role in the Houston boom. The 50-mile ship channel linking the city to the Gulf of Mexico has particularly benefited the Houston area. Since 1910, the Federal Government has spent $53 million to dredge and maintain the channel, yet customs revenue exceeds the total federal investment every two years. The Port of Houston is the third largest of U.S. seaports in total tonnage moved. Served by 117 steamship lines which bring more than 4,000 ships to the port annually, Houston's total cargo moved in 1965 was approximately 58 million short tons.

In addition to the ocean-going freight, access to the intracoastal channel provides Houston with low-cost barge transportation. This 1,777 mile waterway links the city with some 9,812 miles of waterway in the Mississippi River region, and 2,100 miles of waterway into the Gulf South. In 1963 inland waterway tonnage in the Houston area exceeded 22 million net tons.

In air transportation, Houston is well served by 10 airlines which had total passenger arrivals and departures of 2.6 million in 1965. The present Houston International Airport is already strained by heavy traffic, and a second airport, Houston Intercontinental Airport, is now under construction on a 7,000 acre tract in north Harris County. With facilities to handle both subsonic and supersonic air transportation, the new airport is designed to accommodate the anticipated growth of area traffic.

Houston also offers good surface transportation. Six major rail systems serve the city and total freight

handled by rail in 1965 was 18.9 million short tons, a 24% increase over 1960. Motor freight is provided by 34 common carrier truck lines as well as by a number of specialized carriers, including 41 oil equipment haulers, 14 tank truck lines, 17 household carriers, and 20 miscellaneous specialized carriers. Five bus systems provided hourly service in all directions. A $500 million freeway system will extend 245.5 miles in the form of inner and outer loops around the city with connections from Houston's downtown center to provide quick, efficient access to the entire metropolitan area.

The transmission of oil and gas is also a major factor in the Houston economy. The city is the hub of a pipeline network which includes 40 crude oil pipelines and 29 products pipelines. Ten natural gas pipeline companies headquartered in the city and four other companies having national operations in Houston account for a quarter of the national gas pipeline firms.

The rapidly expanding Houston business climate served by these transportation and transmission facilities has required an enormous amount of construction. In 1965, the value of building permits ranked Houston third in the nation. Nonresidential construction contract awards in that year totaled $377.4 million. From 1960 to 1965, the total of such awards was $1.8 billion. The estimated value of residential units completed in 1965 was $222.6 million, and from 1960 to 1965, was $1.1 billion. While suburban areas have spawned substantial business areas of their own, the downtown section of Houston has added about 10 million square feet of new building space since 1950 and the workday population has increased by more than 80 thousand persons to an estimated 180 thousand in 1965.

New business developments in Houston indicate that the momentum of the economy's growth will not diminish. Humble Oil and Refinery Company has commenced an industrial, commercial and residential complex on 30 thousand acres within the metropolitan area which is expected to require $1.4 billion in total capital investment, $1 billion annually in sales, 25 thousand new jobs and $166 million annually in new payroll by 1984. This development surrounds the NASA Manned Space Craft Center, which now has 5,000 employees with an annual estimated payroll of $60 million. NASA has granted procurement contracts totalling $25.4 million in 1965 to Houston area concerns.

Another major entry into the Houston area is a new United States Steel Company manufacturing facility. This project will require an initial $150 million investment for plant and related facilities covering 15 thousand acres.

The full importance of the Houston economy is manifestly evident when comparison is made with the two other large metropolitan areas, Dallas and New Orleans, in Houston's section of the country. The following table indicates that Houston surpasses both the other cities in most of the important economic indicators.

	Houston	Dallas	New Orleans
Composite Indexes of Economic Importance	1	2	3
Composite Indexes of Amount of Growth	1	2	3
Total City Population Corporate Limits, 1964	1,091,800	802,600	663,500
Population Ranking among U.S. Cities, 1964	6	9	15
Absolute Increase in City Population, 1964/1950	495,637	368,128	93,065
Total Metropolitan Area Population, 1964	1,652,800	1,310,600	997,400
Absolute Increase in Metropolitan Area Population, 1964/1950	708,200	560,000	277,500
Percent Population Increase in Metropolitan Area Population, 1964/1950	76.7	76.3	45.5
Total Value Added by Manufacture, 1963	$1,889,693,000	$1,164,721,000	$627,018,000
Total Bank Demand Deposits, 1964	$1,613,633,200	$1,369,165,700	$659,730,900
Total Building Permit Values, 1964	$321,700,000	$193,506,600	$105,300,000

In addition to capital investment and production facilities, Houston is an educational, cultural and recreation center. There are more than 36,000 students in twenty Houston area colleges and universities including the noted Rice University, the large University of Houston and the famed Baylor University College of Medicine. A new center for the performing arts, Jones Hall, provides one of the finest such facilities in the country. The Houston Symphony is one of the leading American orchestras, and four legitimate theaters give performances throughout the year. The Museum of Fine Arts has an extensive and varied collection. Spectator sports are well represented by the Oilers of the American Football League, the Astros of the National Baseball League and intercollegiate games. Sports facilities include numerous parks and playgrounds, golf courses, swimming pools, and tennis courts, as well as lakes and the Gulf of Mexico. These facets of Houston create a pleasant environment which should insure Houston's place as a major population center of the southwestern United States.

This description of the Houston economy indicates an area of unusual vigor with heavy and sophisticated demands on its facilities and resources. These needs are remarkably well met in almost every phase of the Houston economy, with the exception of financial institutions.

The entire state of Texas, and Houston in particular, is handicapped in providing indigenous financing to local industries and businesses by the archaic state branch banking laws which forbid any establishment or operation of branch banks in Texas. This artificial restraint has prevented the downtown banks from following their customers to the suburbs and from generating new business among the many com-

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mercial and industrial establishments operating in the suburban shopping centers and industrial complexes. The result of this impediment has been to limit unduly the accumulation of capital resources by the urban commercial banks, thus preventing some businesses from obtaining funds for investment in new facilities or driving them to financial centers outside the area which are able to meet their needs.

The fact that there are 115 banks in the Houston SMSA demonstrates the dispersion of banking resources. Many of these banks, most of which have resources under $10 million, are located in suburban areas where branching would be a logical method of expansion.

The largest Houston banks have had particular difficulty in meeting their responsibilities. While the area ranks thirteenth in population in the nation, the charter bank, the largest bank in the area, ranks forty-first nationally. The Texas National Bank of Commerce, which is the second largest Houston bank, stands fifty-second nationally. The failure of the Houston banks to keep pace with the growth of its area has led to unfortunate results. Cities with more satisfactory banking facilities can attract industry which needs large-scale financing. Moreover, many local projects are simply unable to obtain financing due to the preference of large banks in other areas for projects in those areas.

In the past year, the charter bank was forced to decline or divert over $31 million in loans requested by sound and prosperous local companies because its loan limit was not sufficient. Because of its inadequate size relative to the community it serves, First City was also forced to participate over $77 million more in loans.

The merging bank also found itself unable to cope with the demands of its customers. Southern Na-

tional was forced to participate almost $16 million of loans last year because of its inadequate size. Its lending limit, in an area of such unparalleled growth as Houston, is $600,000.

With the rational means of expanding—i.e. branching—foreclosed to the applicant banks, growth adequate to meet the increasingly heavy demands of the Houston community is available only through merger. The transaction must, however, meet the criteria of the Bank Merger Act, as amended.

The effect of the merger upon competition must be considered in judging the application. The Houston area is marked by intense competition among a plethora of financial institutions. There are 115 commercial banks, with total resources of $4.386 billion in the Houston metropolitan area, 23 savings and loan associations in Harris County with total savings accounts of $758.2 million, 240 credit unions with assets of $120.9 million, 232 finance company offices, 13 factors and 12 small business development companies. Harris County alone, which contains the downtown Houston area, has 85 individual unit banks. In addition, 50 insurance companies domiciled in the Houston metropolitan area and many others operating there make loans estimated at hundreds of millions of dollars. The largest mortgage banking firm in this country, which services 1.4 billion dollars of loans, and four other large mortgage companies which service an additional 1.4 billion dollars of loans are headquartered in the Houston metropolitan area. All of these institutions vie for the loan and savings dollars of the potential Houston area customers of the applicant banks. A further indication of the strong competition is that in 1965 the largest single financer of new cars purchased in Harris County was GMAC, which financed 11.5% of the cars financed. The

charter bank financed but 2.7% of the new cars financed, and Southern National financed only 0.5%.

The intense competition is particularly well illustrated by the fact that, in an eight-block area in downtown Houston where both applicant banks are located, there are eight banks either larger than, or of comparable size to, Southern National. In the same area, there are five other, similar downtown banks which provide adequate retail banking services. All 13 competing banks are easily and quickly reached by walking or using the shoppers special bus which traverses the downtown area at five minute intervals. In addition, there are eight savings and loan home offices, and one savings and loan branch within this eight-block area. These offices, together with the numerous suburban offices of financial institutions, indicate that a very wide range of choices will remain after this merger. Indeed, in the period from 1956 to 1965, the percentage of total assets, deposits and loans in the Houston area held by the largest Houston banks declined substantially as pointed out in the following table:

Concentration in commercial banking

	Column 1—1958			Column 2—1965			Column 3—Percent decrease in concentration			Column 4—Percent increase in concentration after merger			Column 5—Percent decrease in concentration remaining		
	Assets	Deposits	Loans	Assets	Deposits	Loans	Assets	Deposits	Loans	Assets	Deposits	Loans	Assets	Deposits	Loans
Top 3 Banks	62.6%	61.6%	63.1%	57.4%	56.6%	56.6%	8%	8%	13%	3.3%	3.5%	3.9%	4.7%	4.5%	9.2%
Top 5 Banks	75.8%	75.2%	76.4%	63.9%	63.1%	62.4%	16%	16%	18%	3.6%	2.1%	3.3%	12.0%	11.9%	14.7%
Top 10 Banks	82.0%	81.5%	82.8%	71.6%	70.9%	72.1%	12%	12%	12%	2.6%	1.7%	1.7%	9.4%	10.3%	10.3%

It has been alleged in advisory reports from other agencies that the applicant banks have affiliates whose deposits and loans should be added to those of the applicant banks for the purpose of determining concentration. While it is true that certain interests owning shares in the applicant banks also own shares of some smaller banks in the Houston area, each of these banks operates independently. They have, for example, turned down participation loans offered by the applicant banks. In no case does any officer or director of one of the applicant banks own as much as 50% of a smaller bank. Some of these smaller banks do have close relationships with the applicant banks, but these correspondent type relations are common among independent banks. Because these so-called affiliate banks operate independently with an independent board of directors, we cannot include them in determining the percentage of concentration of the applicant banks in the Houston area market.

Competition for accounts is not confined to the Houston area. Both of the applicant banks are primarily wholesale banks and thus compete in the national market. It is widely held in the banking profession that accounts of $100,000 or over are considered to be wholesale accounts because their size permits them to take advantage of the best banking conditions in any part of the country. Statements from other quarters that such accounts do not actively shop among major banks, regardless of geography, only indicate a lack of familiarity with the operations of financial institutions, particularly commercial banking. The charter bank has 76% of its IPC demand deposits in large accounts of $100,000 and over, and the merging bank has 71% of its IPC demand deposits in the over $100,000 accounts. Loans in excess of $100,000 represents 79% of First City's total commercial and industrial loans, and 78% of South-

ern's total commercial and industrial loans. First City has 42% of its lines of credit, or $63,000,000, extending to firms operating beyond the Houston metropolitan area. In the $100,000 and over IPC demand deposit accounts, individuals and firms with headquarters outside the Houston SMSA accounted for 41.2% of First City's accounts and 34.5% of Southern National's accounts.

In correspondent accounts, the charter bank has 535 deposit accounts totaling $113.937 million. Four hundred twenty of these accounts are from American banks outside the Houston SMSA, and 47 are from foreign banks. Southern National has deposit accounts from 41 banks outside the Houston SMSA totaling $4.533 million, and from 25 banks within the SMSA totaling $8.452 million.

Although it is difficult to document because of private bank records, competition by major banks located in other financial centers is vigorous in Houston. Banks in New York, Boston, Chicago and Dallas and on the West Coast enter the Houston area and obtain sizable loans. A 1957 Federal Reserve study, for example, reported that New York banks held $375 million of loans to Houston borrowers, the largest amount of out-of-city loans made by New York banks that year. This intense competition from out-of-state banks has not abated over the years, but has, in fact, increased in vigor.

It is clear then that the effect of the merger upon competition will not be adverse in the Houston area as there will remain a wealth of choices for financial services in the downtown and suburban areas. In the wholesale banking market, which is the specialty of both applicant banks, the merger will be a salutary influence on competition because of the increased

ability of the resulting bank to compete effectively with other large wholesale banks.

Another factor which must be considered under the Bank Merger Act is the management of the applicant banks. The charter bank, while well managed in the past, now finds itself seriously understaffed, largely due to recent deaths and retirement of its officers. There are no immediate prospects for relief, apart from the merger, because many of the charter bank's key officers are near the retirement age. Recruitment from outside is both difficult, because of the national shortage of qualified bank personnel, and uncertain, because of internal morale problems when new employees are systematically brought in above First City's present personnel.

The infusion of personnel from the merging bank will alleviate this problem. With respect to age, the average age of Southern National's executives is ten years below the average age of First City's, and Southern National's executives are grouped in age brackets and job categories where First City has the greatest needs. After merger, the resulting bank will be able to staff adequately its existing departments and expand into broader areas of service which are required in the Houston area.

The increment in services will permit a greater response to the convenience and needs of the Houston community. There are a number of areas in which the applicant banks do not offer adequate service, or any service, but where the combined resources and manpower of the resulting bank would permit the offering of these services.

Neither of the banks offers long-term permanent real estate loans. The combined construction loan staffs of the applicant banks will enable the resulting bank to expand into a permanent real estate loan operation.

These loans could be handled for the bank's own portfolio, for investments by trusts which the bank is servicing, and as a means to enlarge mortgage servicing to other institutions.

The resulting bank will also be able to offer more comprehensive automated services to the Houston community than either applicant bank now offers. While both banks have been primarily occupied with internal operational needs in the automation area and the provision of such services to other banks, the combining of the banks will permit expansion into professional billing, insurance premium processing, brokerage accounting and other areas. Commercial accounting services which will be expanded or originally offered by the resulting bank include payroll, receivables, payables and general ledger accounting services.

Another major advantage of the merger will be the development of a substantial international department. Although the four largest banks in Houston now offer some foreign banking services, they are not adequate for the international commerce generated in the Houston area. With the increased manpower and facilities of the resulting bank, establishment of foreign agency offices and organization of an Edge Act subsidiary for expanding foreign activities become feasible for the resulting bank. With the increasing importance of Houston as a foreign trade center and the continuous overseas expansion of the oil and gas industry, much of it based in Houston, the development of a strong international department by the resulting bank will be a notable service to the community.

A new department will be created to handle equipment leasing financing. The charter bank has not had personnel to handle this business to any appreciable extent and the merging bank has been impeded by a

lack of loanable funds. This new department will offer increased competition to the Houston area banks now offering this service.

The trust department of the resulting bank will be strengthened by the merger. Corporate trust services concerned with debenture issues and various types of secured corporate indentures will be offered to the customers of the merging bank. The charter bank's collective investment programs, and services to local mutual funds and development funds would be expanded. The establishment of a real estate investment trust would be within the capability of the resulting bank's trust department.

The applicant banks also expect to increase the activities of the investment department now operated by the charter bank. There should be greater participation in the municipal bond dealer area, as well as in the purchase and sale of government bonds and federal agency obligations. In addition, the resulting bank could provide expanded money desk, federal funds and negotiable certificates of deposits services.

Thus, it is evident that the convenience and needs of the Houston area banking community will be considerably enhanced by the proposed merger. The increased size and complexities of the Houston economy demand these new and improved banking services. We, therefore, find that any anti-competitive effects of this transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the Houston area community, and the application is approved.

JAMES J. SAXON,
Comptroller of the Currency.

Dated NOVEMBER 10, 1966.

III

Report by the Board of Governors of the Federal Reserve System to the Comptroller of the Currency, Under Section 18(c) of the Federal Deposit Insurance Act, on the Competitive Factors Involved in the Proposed Merger of Southern National Bank of Houston, Houston, Texas, into the First City National Bank of Houston, Houston, Texas

I. The Proposal

First City National Bank of Houston, Houston, Texas (City National) (deposits $850,843,000 as of April 5, 1966), and Southern National Bank of Houston, Houston, Texas (Southern National) (deposits $66,309,000 as of April 5, 1966), have requested prior written consent of the Comptroller of the Currency to merge under the charter and title of City National.

The two banks are situated across the street from each other in downtown Houston, and are connected by an underground tunnel. The Southern National Bank building was formerly the First City National Bank building. Under Texas law, a bank may not operate branch offices. However, in this instance Applicants have advised that officials of the Banking Department of Texas have been contacted and indicated that the use of both bank buildings, including detached drive-in facilities of Southern National, would not be viewed as operating a branch. Accordingly, the resulting bank plans to utilize the banking quarters of both banks as they now exist.

II. The Community

Houston (1960 population 938,000) is in Harris County (1960 population 1,243,000), and the Houston Standard Metropolitan Statistical Area as defined by the U.S. Bureau of the Budget consists of five area counties (1960 population 1,418,000). Houston is the

first-ranking city in the southwest from the standpoint of industry and population and the sixth largest city in the nation. The Houston area has been one of the most rapidly growing areas in the United States and is one of the world's leaders in the production of oil, gas, refined products, chemicals, petro-chemicals, oil tools and in related manufacturing, and processing and servicing activities. Houston is ranked as one of the nation's three greatest deep seaports, and these facilities are constantly being expanded and improved. Of considerable importance to the local economy was the establishment of NASA's Manned Space Center, 15 miles southwest of downtown Houston, in 1962. Prospects for continued growth and development in the area are favorable.

III. Competition Between the Two Institutions

As previously indicated, the two banks are located across the street from each other in downtown Houston.

The following schedule shows the major segments of the loan and deposit accounts of the two banks as of April 5, 1966:

	Percent of total	
	City National	Southern National
LOANS		
Commercial and industrial	60	52
Consumer	17	19
Real Estate	3	14
Loans to financial institutions	17	----
Loans for purchasing or carrying securities	----	15
Other	3	----
	100	100
DEPOSITS		
IPC—demand	48	43
IPC—time	26	31
Public Funds—demand and time	9	5
Banks—demand and time	16	20
Other—demand	1	1
	100	100

An analysis of the loan and deposit accounts of the two banks discloses similarities in the type of business conducted, indicating that the banks are similar in general character except for size. Loans represent approximately 50 per cent of deposits at City National and 69 percent of deposits at Southern National. The current legal lending limit is approximately $7,500,000 and $600,000 at City National and Southern National, respectively. There is no significant difference in the interest rates charged on loans, service charges on demand deposits, or interest paid on time and savings deposits.

Both banks offer fiduciary services. No common ownership or management was disclosed.

Consumation of the proposed merger would eliminate existing and potential competition between the two banks.

IV. Other Competitive Effects

There were 115 banks operating in the (five county) Houston Standard Metropolitan Statistical Area as of December 31, 1965, of which 85 were in Harris County and 60 of these were in the city of Houston. There were 16 banks in downtown Houston within a 27-block area. City National is the largest bank in the Houston area and Southern National is the sixth largest bank. As of December 31, 1965, the 3 largest banks in Harris County held approximately 60 percent of the county's deposits. The following schedule shows the relative position of the banks in Harris County as of December 31, 1965. According to Applicants, each of the banks involved in this proposal derive 75 per cent of their deposits of individuals, partnerships and corporations from Houston and Harris County.

	Total deposits, Dec. 31, 1965	
	Amount (thousands)	Percent
City National	$911,702	24.6
Southern National	77,562	2.1
Resulting bank	989,264	26.7
Texas National Bank of Commerce	700,060	19.1
Bank of the Southwest NA	587,401	15.8
Houston National Bank	169,417	4.6
Houston Bank & Trust Co	82,308	2.2
Bank of Texas	60,520	1.6
Continental Bank & Trust Co	64,565	1.7
Fannin Bank	51,768	1.4
Citizens State Bank	51,354	1.4
Pasadena State Bank	47,173	1.3
State Main Street Bank	44,775	1.2
73 other banks with deposits less than $40,000,000 each	849,420	22.9
Total	3,707,040	100.0

City National is affiliated by common ownership with 10 other banks located in Harris County, which have aggregate deposits of about $188 million. City National and its 10 affiliates control about 30 percent of deposits held by Harris County banks. Southern National is affiliated through common ownership with 2 other Harris County banks, which have total deposits of about $26 million, and thus, Southern National and its affiliates control about 3 percent of Harris County bank deposits. The resulting institution, considering its affiliates, would hold 33 percent of Harris County bank deposits.

City National has been involved in several mergers since it was chartered in 1934, and became the largest bank in Houston upon its merger with First National Bank in 1956. Southern National was chartered in 1960 and remained a relatively small bank until the Texas Eastern Transmission Corporation acquired 46.8 percent of the bank's outstanding stock in early 1962; the bank has progressed rapidly since that time.

During the investigation of this proposal, officials of all the larger downtown banks were contacted, and

all expressed the opinion that their competitive positions would not be adversely affected by the proposal. None offered any objection to the proposed merger, and no apprehension was expressed that competitive rates and practices would become detrimental.

Nonbank financial institutions in Houston include numerous savings and loan associations, credit unions, sales finance companies, mortgage companies, factoring agents, and insurance companies. Competition from financial institutions located in other major financial centers is also substantial.

V. Conclusion with Respect to Competitive Factors

Consummation of the proposed merger of First City National Bank of Houston and Southern National Bank of Houston would eliminate existing and potential competition between them and enhance City National's position as the largest bank in the Houston area. The overall competitive effect of the proposal would be adverse.

> NOTE.—As required by section 18(c) of the Federal Deposit Insurance Act, this report is limited to a report on the competitive factors involved, and is not a recommendation as to whether the application should be approved or disapproved.

IV

DEPARTMENT OF JUSTICE,
Washington, July 26, 1966.

Hon. JAMES J. SAXON,
Comptroller of the Currency,
Treasury Department,
Washington, D.C.

DEAR MR. SAXON: This is in response to a letter which we received from your office on June 23, 1966,

requesting a report pursuant to the provisions of Section 18(c) of the Federal Deposit Insurance Act on the competitive factors involved in a proposed merger of First City National Bank of Houston, Houston, Texas (First City), and Southern National Bank of Houston, Houston, Texas (Southern National).

Your office transmitted to us with your letter of request only a limited portion of the merger application filed with you by the banks. Your office removed from the application the data and information pertaining to the effect of the proposed transaction on competition, the convenience and needs of the community, management of the banks, and the banks' financial history and condition.

The banks' complete merger application was furnished to the Antitrust Division by counsel for First City under cover of a letter dated July 8, 1966 in which counsel for First City advised us that they had been informed that your office had no objection to their furnishing the Division with copies of the application as submitted to your office. This application is the principal source of information relied on in this report.

The Merging Banks.

First City is the largest commercial bank in Houston and the third largest bank in the State of Texas. Although its predecessors go back many years, it was chartered in 1934 as City National Bank of Houston and its present name was assumed in 1956 when City National merged with First National Bank in Houston. It conducts a complete commercial banking and trust business through its office at 1001 Main Street in downtown Houston. As of April 5, 1966, First City had total assets of $966,535,000, total deposits of $850,843,000, and total loans of $426,119,000. In 1965 its net current operating income was $12,038,000, or

about 14 per cent of its total capital accounts. Its average net operating income for the period 1961–1965 was $10,685,000.

Southern National is the sixth largest commercial bank in Houston. It was chartered in 1960, has never participated in any merger or consolidation, and its rate of growth has been greater than that of any other bank opened in Houston in the last ten years. In 1960 its deposits amounted to $6,390,000. As of April 5, 1966, it had total deposits of $66,309,000, total assets of $81,761,000, and total loans of $45,638,000. In 1965 its net current operating income was $948,000, or about 13 per cent of total capital accounts, and in the period 1961–1965, its average net operating income was $595,000. It conducts a commercial banking and trust business through its office at 921 Main Street in downtown Houston, directly across the street from the office of First City. The proximity of the offices of the merging banks will make the proposed merger unique among mergers in Texas. State laws do not permit branch banking and, in the usual case, the facilities and location of the acquired bank are lost. However, because the offices of First City and Southern National are in buildings which are less than 500 feet apart and connected by a tunnel, Texas law permits the continued use of both banking houses.

Relevant Markets

According to the application, the "community to be served" by the merged bank is the Houston metropolitan area, which ranks thirteenth in size among all metropolitan areas in the United States and has a population of 1.7 million. As presently constituted, the Houston SMSA includes Harris County, in which Houston is located, and the four adjoining counties of Brazoria, Ford Bend, Liberty, and Montgomery.

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Prior to March 1965, however, the Houston SMSA was largely confined to the limits of Harris County. This change in the coverage of the Houston SMSA necessitates qualifications in making comparisons between the banking structure of the area as presently defined and that of earlier years, and may lead to unwarranted assumptions regarding the extent of competition between the area's largest banks—all of which are located in Houston—and many of the smaller banks in Harris County and the four outlying counties.

For example, by reason of the 1965 change in the coverage of the Houston SMSA, at least twenty-seven small banks in the outlying counties are now included in the Houston metropolitan area and are listed in the application as competitors of the merging banks. But there are no data in the application to support the assertion that these outlying banks are in fact competitors of the large Houston banks. This lack of data assumes greater significance in light of the state prohibitions against branch banking and in light of the claim made in the application that the effect of the merger on retail competition will be insubstantial because both merging banks are primarily "wholesale" banks and because the retail customers of Southern National will find readily available alternatives in the banks which will remain in Houston and its suburbs after the merger.

In view of the unit nature of banking in Texas, the preeminence of Houston and Harris County in terms of population, commerce and industry, and lack of specific information in the application as to the origin of the business of the merging banks, a realistic appraisal of relevant banking markets would seem to require that Houston and Harris County as well as the broader metropolitan area each be con-

sidered as appropriate sections of the country in which to analyze the effect of the proposed merger on competition.

Competition Between the Merging Banks

Notwithstanding the close physical proximity of the merging banks and despite their characterization in the application as being primarily the same type of bank, it is asserted that the amount of competition which will be eliminated by the merger is insubstantial. This conclusion appears to be based on the assertions (1) that both banks are primarily "wholesale" banks and that "the great bulk of the competition between First City and Southern is for wholesale business," and (2) that Southern National's retail business is small and that since a number of banking alternatives will remain in Houston and the suburbs for retail customers, the elimination of Southern National will be without significant effect on the retail market.

These arguments appear to be flawed in a number of respects. "Wholesale banking," an imprecise term at best, is not defined in the application beyond the assertion that any loan or deposit of a size over \$100,000 is "wholesale" business. Further, such wholesale business is arbitrarily assumed in the application to be solely "national" business. There are no data in the application regarding the amounts of "wholesale" business done by other area banks and the various figures given in the application for the wholesale-national business of the merging banks are contradictory. For example, it is asserted (p. 64), that Southern National has 90 individual and commercial demand deposits in amounts of \$100,000 and over which total \$40,492,000 and that 30 of these accounts, amounting to \$17,382,000, are "national" accounts because they have headquarters outside the

Houston metropolitan area. On the other hand, Appendix A, which purports to allocate the local and national business of the merging banks, assigns all 90 of Southern National's demand accounts of $100,000 and over to the national area, despite the fact that 60 such accounts have headquarters in Houston. A similar inconsistency appears in the comparable figures given in the application for First City. Thus, the data contained in the application will not support an inference that customers with demand deposit accounts of $100,000 and over can turn to banks located in other parts of the country as alternative sources of banking services.

Moreover, even if the arbitrary division between large and small business employed in the application is accepted, it cannot be said that Southern National's $25 million of individual and commercial demand deposit accounts under $100,000 constitutes an insignificant share in the local market where only 20 banks among the 115 listed in the application as competitors in the Houston SMSA have total deposits exceeding $25 million. In any event, it must be assumed, absent evidence to the contrary, that the $25 million of such deposits held by Southern National were gained in direct competition with First City, which holds $106 million in such deposits, and that this substantial amount of direct competition would be eliminated by the merger.

Direct competition also exists between the merging banks at all levels for other types of commercial banking business. It is clear that they compete with each other for substantial amounts of large-sized loans and deposits of all types. Both have substantial construction loan businesses. Both are active in the consumer loan area. Both have extensive correspondent systems. An analysis of the loan portfolios

of the merging banks shows that of First City's total loans of $426,119,000 as of April 5, 1966, only $76,466,000 were in categories of loans (primarily to financial institutions) not also then outstanding at Southern National. Conversely, none of the $45,638,-000 in total loans held by Southern National as of April 5, 1966 were in categories of loans not then also outstanding at First City. The similarities in the deposit accounts of the merging banks are even more pronounced. Both banks offer trust services, although the trust business of Southern National is relatively small.

Finally, the close physical proximity of the offices of the merging banks would seem to insure, absent evidence to the contrary, that a substantial portion of the business of each bank is done with individuals and businesses located in downtown Houston for which the two banks represent equally convenient banking alternatives.

Probable Effects of the Merger

The relative competitive positions of the larger Houston commercial banks are shown in the table below. It should be noted, however, that the table does not fully reflect the competitive realities of the local market. The three largest Houston banks, including First City, are reported to have close ties through stock ownership and personnel interlocks with many of the smaller banks in Houston. Thus, actual concentration of banking resources is greater, and the number of competitive alternatives is correspondingly less, than would appear from the number of separately-chartered banks in the area. This factor must be given careful consideration in evaluating the competitive situation in Houston. However, little information on the extent of such interrelations is

given in the application and we do not have complete data regarding them from other sources. The application does reflect the existence of interlocks between First City and seven state-chartered banks listed in the application as competitors of First City. We believe that First City may also have close ties with at least six additional state-chartered banks among those listed in the application as competitors. The application also reflects an interlock between Southern National and one of the listed competitors. Finally, the second and third largest banks in Houston are reported to have close ties with a total of eleven of the smaller banks listed in the application as area competitors.

[Dollar amounts in millions]

Rank	Name	Total deposits (amount)	Percent of Houston	Percent of Harris	Percent of SMSA
1	FIRST CITY	$911.7	26.2	24.6	23.4
6	SOUTHERN NATIONAL	77.6	2.2	2.1	2.0
(1)	(Resulting Bank)	989.3	28.4	26.7	25.4
2	Texas National	709.1	20.4	19.1	18.2
3	Bank of the Southwest	587.4	16.9	15.8	15.0
4	Houston National	169.4	4.9	4.6	4.3
5	Houston Bank & Trust	82.3	2.4	2.2	2.1
	Total, 6 largest banks	$2,537.5	73.0	68.4	65.0
7	Continental Bank & Trust	64.3	1.8	1.7	1.6
8	Bank of Texas	60.5	1.7	1.6	1.6
9	Citizens State	51.3	1.5	1.4	1.3
10	Fanin Bank	51.8	1.5	1.4	1.3
	Total, 10 largest banks	$2,765.4	79.5	74.6	70.9
	Total, 62 banks in Houston	$3,477.1	100.0	93.8	89.1
	Total, 85 Banks in Harris County	$3,706.8	----------	100.0	95.0
	Total, 115 banks in SMSA	$3,900.5	----------	----------	100.0

NOTE.—Detail may not always add to total due to rounding.
Sources: Application and Polk's, March 1966 ed.

As the above table shows, First City and Southern National are substantial competitive factors in the City of Houston, in Harris County and in the Houston metropolitan area. Their combination would give the resulting bank more than one-fourth of the total commercial banking deposits held by the 114 banks that will remain in the metropolitan area after the merger. Six banks presently account for approxi-

mately 65 per cent of the commercial bank assets, deposits and loans in the SMSA and the three largest Houston banks together hold about 57 per cent of the entire area's assets and deposits and more than 60 percent of its loans (without giving effect to the existence of the close ties between the three largest banks and their many smaller satellites). The merger would reduce the number of independent banks which control these large shares of the area's bank resources to five.

Borrowers in the area whose banking requirements might not be satisfactorily met by the resources of the smaller banks would be deprived by this merger of one of the few substantial competitive sources of such credit. Smaller individual and business borrowers and depositors in the downtown Houston area would lose one of their few readily-accessible bank alternatives. The merger would also eliminate one of the few downtown Houston banks with the capacity to act as city correspondent for the many country banks in Texas which require a correspondent in Houston.

The increase in concentration that will result from the proposed merger is significant in relation to the existing concentrated banking structure in the Houston area. This concentration is in large measure a direct result of four mergers among Houston banks since 1953. Three of these prior mergers combined the then six largest downtown banks into what are now the two largest institutions, and the fourth and most recent merger resulted in what is presently the fourth largest bank in Houston. First City's 1956 merger combined two institutions having assets of $348,317,000 and $333,943,000, respectively. The largest previous merger—which produced the Texas National Bank of Commerce with $862 million in

resources—will be eclipsed by the presently proposed merger with its resulting $1,100,366,000 in total resources.

The applicant banks urge that any increase in concentration resulting from their merger should be weighed against what they discern to be a gradual trend toward deconcentration in the Houston metropolitan area in the last ten years, a trend attributable in part to the entry of forty-six new commercial banks (41 of these in Houston and Harris County) which have all experienced steady growth. The application gives the following figures as descriptive of this trend: In Harris County in 1956, the three top banks held 65.8 per cent of assets, 65.6 per cent of loans, and 64.8 per cent of deposits, while in 1965 the top three held 60.3 per cent of assets, 57.1 per cent of loans, and 59.5 per cent of deposits (figures given in the application for the Houston SMSA show similar changes). The applicants seem to be suggesting that any increase in concentration brought about by their proposed merger can only be temporary because the long-term trend in the area is toward deconcentration.

This analysis overlooks the fact, pointed out above, that many of the new commercial banks are affiliated with the largest Houston banks. While precise data as to the extent of such affiliations is not presently available to us, it is clear that if affiliated banks were considered as single institutions, the purported decrease in concentration would be lower and that, in fact, a net increase in concentration might be evident. Moreover, regardless of the purported decrease in banking concentration in the Houston area, it is clear that this merger would further increase the disproportionate size and dominant position of First City.

Thirty-four of the forty-six newcomers during the last ten years each have less than $10 million in deposits, only four have more than $25 million in deposits, and the largest and most vigorous of these new entrants—Southern National—will be eliminated by the proposed merger. It is a striking fact that despite the unit nature of Texas banking, and despite the large numbers of newcomers and existing banks, more than 70 per cent of the SMSA's commercial bank assets, loans and deposits remain in the hands of only ten banks, and nearly one-fourth of the entire area's assets and deposits and 19 per cent of its loans are held by one bank—First City.

The principal reasons urged in support of the merger are that the growing Houston metropolitan area needs a larger bank to serve local customers who must presently look to other cities for banks large enough to accommodate their requirements, and that enlargement of First City's lending limit as a result of the merger would help meet such local needs by permitting First City to make loans which in the past it has been forced to decline or to participate; that First City has a serious management succession problem which could best be met by the management that could be brought to the merged bank by Southern National; and that the merged bank could offer many new and expanded services such as extended area computer services and general international banking services. As to the first of these reasons, we think it is clear that the alleged increased ability of the resulting bank to serve the very largest customers—many of whom are already capable of obtaining their banking needs from institutions in other cities—cannot justify the lessening of competition for the business of those customers who cannot turn to banks in other cities and who must therefore rely on banks located in the

Houston area. Moreover, we note that First City's relatively low loan-deposit ratio—44% as of December 31, 1965—indicates that First City is capable of substantially increasing its loan volume within the limits of its present resources. As to the second and third reasons for the merger, we are convinced that a bank with the resources of First City is fully capable of solving problems of management succession and the need to offer new services, by means less injurious to competition than the proposed merger.

Conclusion

The proposed merger would eliminate substantial competition between the participating banks and appreciably increase concentration in a market whose present highly concentrated structure is due in large part to previous mergers among its largest banks, including the applicant First City. We conclude that the proposed merger would have a serious adverse effect upon competition in the Houston area.

A summary of this report is attached.

Sincerely yours,

DONALD F. TURNER,
Assistant Attorney General, Antitrust Division.

SUMMARY OF THE REPORT OF THE DEPARTMENT OF JUSTICE ON THE COMPETITIVE FACTORS INVOLVED IN THE PROPOSED MERGER OF FIRST CITY NATIONAL BANK OF HOUSTON, HOUSTON, TEXAS, AND SOUTHERN NATIONAL BANK OF HOUSTON, HOUSTON, TEXAS

First City is the largest commercial bank in Houston, with assets of $966,535,000, deposits of $850,843,000, and loans of $426,119,000. Southern National is the sixth largest bank in Houston, with assets of $81,761,000, deposits of $66,309,000 and loans of $45,638,000. Both banks offer trust services and both have

extensive correspondent bank activities. The banking houses of the participating banks are located directly across the street from one another in downtown Houston.

The Houston metropolitan area is the thirteenth largest metropolitan area in the United States and encompasses Harris County, in which Houston is located, and the four adjoining counties of Brazoria, Fort Bend, Liberty, and Montgomery. There are 115 commercial banks located in the metropolitan area and the ten largest are located in the City of Houston. The three largest of Houston's banks together hold about 57 per cent of the entire area's commercial bank deposits; in Harris County they hold about 60 per cent of deposits; and in the City of Houston they hold about 63 per cent of deposits (not taking into account the banking resources of twenty-two smaller banks which are closely associated with these three dominant banks). This heavy concentration in the several areas involved is due in large part to four mergers in Houston in the last ten years. Three of these prior mergers combined the then six largest downtown banks into what are now the two largest institutions, and the fourth merger resulted in what is now Houston's fourth largest bank. First City, a participant in one of these earlier mergers, resulted from the combination of two institutions having assets of $348,317,000 and $333,943,000, respectively. First City now holds more than 23 per cent of the deposits held by all 115 commercial banks in the metropolitan area. Southern National, which has grown rapidly since its opening in 1960, now holds 2 per cent of the deposits held by all 115 commercial banks in the metropolitan area.

The proposed merger would eliminate a substantial volume of direct competition between the participat-

ing banks and appreciably increase concentration in the already highly concentrated banking areas of Houston, Harris County, and the Houston metropolitan area. We conclude that the effect of the proposed merger on competition would be seriously adverse.

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